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THE
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YHABBL UROTHAT

THE
SUPREME COURT OF NEW SOUTH WALES

JUDGES AND LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Hon. SIR FREDERICK DARLEY, Knt., Chief Justice.

The Hon. PETER FAUCETT, Esq.

The Hon. SIR WILLIAM MONTAGU MANNING, Knt.

The Hon. WILLIAM CHARLES WINDEYER, Esq.

The Hon. SIR JOSEPH GEORGE LONG INNES, Knt.

The Hon. MATTHEW HENRY STEPHEN, Esq.

The Hon. GEORGE HIBBERT DEFFELL, Esq.

(under special commission, 12th August
to 29th December).

The Hon. WILLIAM OWEN, Esq.

PUISNE JUDGES.

JUDGES IN EQUITY:

The Hon. SIR WILLIAM MONTAGU MANNING, Knt.

The Hon. WILLIAM OWEN, Esq.

JUDGE IN VICE-ADMIRALTY:

The Hon. SIR FREDERICK DARLEY, Knt., Judge Commissary.

CHIEF COMMISSIONERS IN INSOLVENCY:

GEORGE HIBBERT DEFFELL, Esq.

ALFRED MCFARLAND, Esq. (Acting).

ATTORNEYS GENERAL:

The Hon. WILLIAM JOHN FOSTER, Esq., Q.C.

The Hon. BERNHARD RINGROSE WISE, Esq.

MEMORANDA.

On the 3rd April, 1887, it was notified in the *London Gazette* that Her Majesty had directed letters patent to be passed under the Great Seal, granting the dignity of a Knight of the United Kingdom of Great Britain and Ireland unto the Hon. Frederick Matthew Darley, Chief Justice.

On the 19th May, 1887, and by virtue of the "Supreme Court Sixth Judge Act of 1887," 50 Vic. No. 35, Matthew Henry Stephen, Esq., Q.C., was appointed Sixth Judge of the Supreme Court, to take precedence next after his Honour Sir Joseph George Long Innes, Knt.

On the 12th August, 1887, George Hibbert Deffell, Esq., Chief Commissioner of Insolvent Estates, received a commission to act as Temporary Judge of the Supreme Court, under the Act 51 Vic. No. 12, and was sworn in on the 15th August. That Act and the Commission thereunder were enlarged by the Act 51 Vic. No. 16. These powers expired on the 29th of December, 1887.

On the 17th October, 1887, the Honourable Sir William Montagu Manning, Knt., Primary Judge in Equity, resigned.

On the 18th October, 1887, William Owen, Esq., Q.C., was appointed Chief Judge in Equity.

On May 19th, 1887, the Hon. W. J. Foster, Esq., Q.C., resigned the office of Attorney-General.

On May 27, 1887, B. R. Wise, Esq., was appointed Attorney-General.

On Dec. 16th, 1887, Francis Edward Rogers, Esq., Charles Edward Pilcher, Esq., and John Henry Want, Esq., announced to the Court that they had been appointed Queen's Counsel.

ADDENDA ET CORRIGENDA.

COMMON LAW.

Page 201—line eight from bottom—for subsequent, *read* subject.

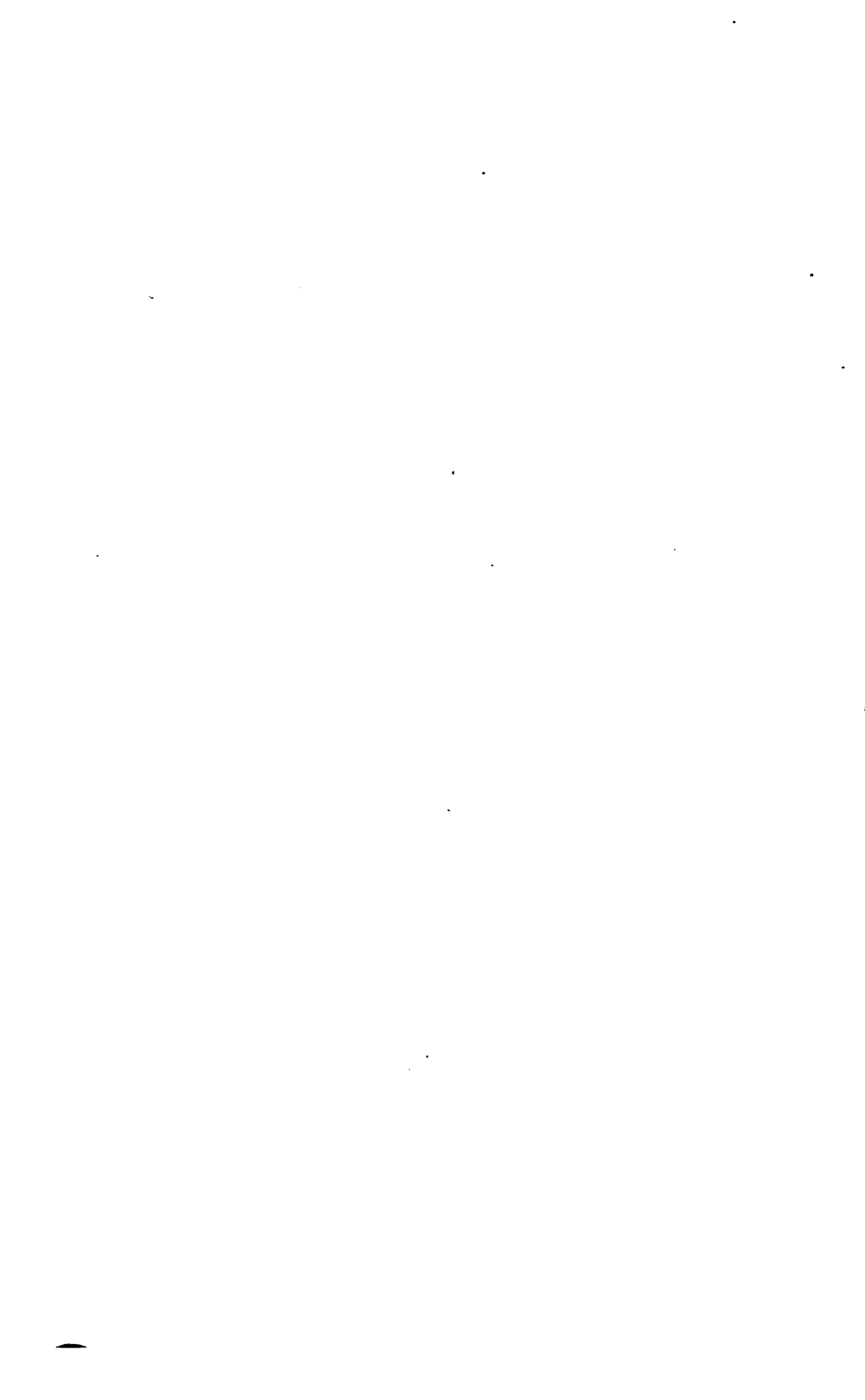
Page 304—last line of note—for wrongly, *read* wrongfully.

Page 305—first line of note—*after* instrument, *add* “is fraudulently or wrongfully retained, he may summon the person to whom such grant, certificate or instrument”

Page 348—line 22—for Maney, *read* Massey.

VICE-ADMIRALTY.

Page 4—line three from bottom—delete “for.”



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C A S E S

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN ITS

Common Law Jurisdiction,

DURING THE FIRST TERM, 1887.

BOROUGH OF RANDWICK v. COOPER.

1887.

Municipalities Act of 1867 (31 Vic. No. 12), s. 163—Private property used for public purposes exempt from rates—Water supply—Sydney Corporation Act (43 Vic. No. 3), s. 142.

Feb. 14.

Faucett J.
and
Innes J.

By s. 163 of 31 Vic. No. 12 "land the property of Her Majesty and unoccupied or used or reserved or vested in trustees for public purposes" is exempted from liability for municipal rates.

The defendant owned certain land which was occupied by the municipal council of Sydney for the purposes of the Sydney water supply.

Held, that the land was "used for public purposes" within the meaning of s. 163 of 31 Vic. No. 12, and was therefore not ratable.

The Borough of Paddington v. The Municipal Council of Sydney (2 N.S.W. L.R. 235) followed.

MOTION *nisi* for new trial.

ACTION for rates. 1st count. The plaintiffs sued the defendant as owner and occupier of certain property within the borough, being ratable property within the meaning of the *Municipalities Act* for certain general and special rates. 2. Common count—The particulars showing that 195*l.* were claimed for lighting rates on 566 acres of land from Feb., 1880, to Feb., 1886, and 200*l.* for general rates for the year ending Feb., 1886.

PLEAS: 1. That the defendant was not the occupier within the meaning of the Act; but the said land was occupied by the

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municipal corporation of Sydney. 2. To that part of the second count, which claims lighting rates, the rates were special rates under the 165th section of the Act, and the defendant's said property did not derive any benefit or advantage from the lighting or from any work relating thereto. 3. Never indebted. 4. The property was not ratable property.

The trial took place on the 14th Dec., before his Honour Sir G. Innes and a jury of four.

The evidence showed that the land, though assessed as "unoccupied" land, was "used" by the Sydney corporation for the purpose of the water supply; that they had reservoirs and a dam, but no hut or building on the land. It was also proved that the defendant had appealed from the rates in 1885. The original proceedings, dated April 30, 1885, and signed by the magistrate, were admitted in evidence. A notice of appeal, as to the rates for 1886-7, signed by the defendant, was also admitted in evidence, as showing that the defendant admitted the property to be his. The plaintiffs were nonsuited on the ground that the property, though the defendant was the owner, was not ratable property within the meaning of section 163 of the *Municipalities Act* of 1867.

Section 163 of the *Municipalities Act* of 1867 (31 Vic. No. 12) enacts:—All lands, houses, &c. . . . within any municipalities shall be ratable property within the meaning, and for all the purposes of this Act, save as is next hereinafter excepted, that is to say, land the property of Her Majesty, and unoccupied, or used, or reserved, or vested in trustees for public purposes. ."

G. B. Simpson, Q.C. (*Browning* with him), for the plaintiffs, moved for a rule *nisi* calling upon the defendant to show cause why the said nonsuit should not be set aside and a new trial granted upon the following grounds:—1. Pursuant to leave reserved. 2. That his Honour the learned Judge was, it is submitted, in error in holding that the defendant's land, in respect of which the rates sued for were levied, was not ratable property within the meaning of the 163rd section of the *Municipalities Act* of 1867 (31 Vic. No. 12). 3. That under the circumstances proved at the trial, his Honour ought not to have nonsuited the plaintiffs,

G. B. Simpson, Q.C. S. 163 only exempts "land the property of Her Majesty and unoccupied or used, or reserved, or vested in trustees for public purposes." These words must be read together. Land which is the property of private persons, although used, &c., for public purposes, is not exempt from rates. Admitting, on the authority of the *Borough of Paddington v. Municipal Council of Sydney* (1), that it would be exempt if vested in trustees or if dedicated or reserved under s. 5 of the *Crown Lands Alienation Act* of 1861, the land in question being neither vested in trustees nor dedicated in any way is not exempt. In the *Borough of Paddington v. Municipal Council of Sydney* (1), it was contended that the words of sec. 163 must be read as though the exceptions were restricted to lands the property of Her Majesty. And Sir J. *Martin, C.J.* (at p. 238), said that, "No doubt at first sight that would seem to be the proper interpretation; but looking at the whole section, it is plain that this cannot have been the intention of the Legislature, because lands vested in trustees for public purposes are not lands vested in Her Majesty at all." Applying that reasoning to the present case, lands "used for public purposes" may obviously be the property of Her Majesty. Therefore, that case does not preclude me from arguing that private lands, so used, are not exempt from rates. In the *Borough of Randwick v. The Mayor of Sydney* (2), the land in question had been declared a water reserve by dedication in the *Government Gazette*. The land is not used by the Sydney corporation under the powers given them by s. 142 of the *Sydney Corporation Act* (43 Vic. No. 3) (3).

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FAUCETT, J. It seems to me that this case is governed by the *Borough of Paddington v. The Municipal Council of Sydney* (1), and though the exact point is not decided there, the principle is the same. It appears to be admitted that the land in question

Faucett J.

(1) 2 N.S.W. L.R. 235.

(2) 2 N.S.W. L.R. 236, in *notis*.

(3) 43 Vic. No. 3, s. 142, enacts :—
"The council may take and use for the purpose of such water supply, all waters collected, flowing or being on or in any stream, watercourse, swamp or other

source of water in the neighbourhood of the said Sydney water reserve, and for this purpose they may enter and use any land, and make, lay and carry out, on, through, or under the said land, any reservoirs, channels, pipes and other works."

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Faucett J.

has been used by the corporation of Sydney for some years. Now we come to the *Sydney Corporation Act* (43 Vic. No. 3). [His Honour read section 142 (3).] It is admitted that they used the land under that section, and made reservoirs and laid pipes.

[*Simpson*. No, your Honour, it is not admitted that they used the land under the section at all. The user began long before that section was passed.]

That may be, but they used it under that section (the 143rd) of the *Sydney Corporation Act*, according to your own admission, for water purposes.

[*Simpson*. I do not admit that they used it under that Act.]

They have used it since the passing of the Act.

[*Simpson*. Yes, and the defendant gets 2,000*l.* a year for it, which shows that the corporation do not use it under that section of the Act.]

Mr. *Simpson* has referred several times to the opinion of the learned Judge who tried the case, and has suggested that, as he is sitting to hear this motion, the plaintiffs will not have the benefit of the opinion of the Full Court. For my part I cannot, and I never could, understand why a Judge should not be able to get rid of any bias that he may have had at the trial, and come to consideration of the case on motion for rule *nisi* as if he had never heard of it before. If I had any doubt about this case, I should consent to a rule *nisi* being granted. But I have no hesitation about it. The land has been used by the Sydney corporation for the purposes of the water supply. That is admitted. They had authority to use the land, and the only authority, as it seems to me, by which they can use it, is that given by section 142 of the *Sydney Corporation Act*. Therefore, they must have used it under that section.

Then we come to section 163 of the *Municipalities Act* of 1867 (31 Vic. No. 12). [His Honour read the section.] The way to

construe that section is as if the words were "land the property of Her Majesty," and "land unoccupied or used or reserved for public purposes," and "land vested in trustees for public purposes." That is to say, land the property of Her Majesty is exempted; land vested in trustees for public purposes is also exempted; and land used, &c., for public purposes is also exempted. It has been most properly decided in the case of *The Borough of Paddington v. The Municipal Council of Sydney* (1) that the words "the property of Her Majesty" do not govern the subsequent words of the section, because land may be vested in trustees and yet not be "the property of Her Majesty." The same principle applies to each of the other four exemptions which this section contains. So that if lands are used for public purposes, or reserved for public purposes, or vested in trustees for public purposes, they are exempt from the payment of rates. It seems to me, therefore, that the only authority for the use of the land in question being section 142 of the *Sydney Corporation Act*, this land was used for public purposes, and is exempt. The rule must be refused. As to the point about the payment of the 2000*l.*, it was never raised. If it had been raised, it might have altered the decision of the Court; but I do not by any means say it would.

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Fauccett J.

SIR G. INNES, J. It is manifest that we cannot consider this question of the payment of 2000*l.* a year by the Sydney corporation to the defendant for the use of this land. Nothing was said at the trial about it, and Mr. *Simpson*, as I understood, did not rely upon it.

Innes J.

I concur with his Honour in thinking that this rule must be refused. I regret that his Honour the *Chief Justice* is prevented from taking part in the judgment of the Court, because he was counsel in the case.

It is true that I expressed an opinion in this case at the trial; but my mind is always perfectly open to receive impressions which may change my opinions. It is said that he who complies against his will is of the same opinion still. But in a matter of this kind a Judge has no "will" to surrender. I am sorry that the matter has not been heard before two

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Innes J.

Judges coming new to the case. I should have had no objection to grant a rule if I thought the points were arguable, although the matter has been fully and ingeniously argued by Mr. *Simpson*. I thought at the trial, and I think now, that the case is governed by the case of the *Borough of Paddington v. The Municipal Council of Sydney* (1), and that that decision really precludes further argument.

And looking at the words of section 163 of the *Municipalities Act* of 1867, it is clear that lands used for public purposes, whether the property of Her Majesty or not, are exempt from rates. It is admitted that the land in question was used by a public body for a public purpose, and there can be no higher public purpose than supplying water for the inhabitants of Sydney. Therefore I think the present case comes within the principle of the decision of the *Borough of Paddington v. The Municipal Council of Sydney* (1); and I concur with the views expressed by his Honour the late Chief Justice in the case.

But if it were a new matter altogether, I should be of opinion that, under section 163 of the *Municipalities Act*, such land as this would be exempt from rates.

Rule refused.

Attorneys for plaintiffs: *Shepherd & Crossman*.

Feb. 15 & 18.

JOHNSON v. PRITCHARD.

Darley C.J.
Faucett J.
and
Innes J.

Master and servant—Implied authority—Course of employment—Negligence of servant when not engaged in his master's business.

The defendant was the contractor for the excavation of the Bondi sewer. C. was his business manager, whose duties it was to attend to the office work, and the financial arrangements. C., being lame, kept a horse and buggy of his own, but not for use in the course of his employment. The defendant, being temporarily absent, left C. in charge of the works, with the additional duties of giving orders to the men and supplying them with material. During the defendant's absence, C. used the defendant's horse and buggy, without his knowledge or consent. One evening, C., while so using the defendant's horse and buggy, after calling at the works to see what was going on, was on his way

home when he met a friend, with whom he turned back and drove to a public-house. While they were inside, the horse bolted and injured the plaintiff.

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Held, that, even assuming that C. had the defendant's implied authority to use his horse and buggy, he was not at the time of the accident in any sense carrying out the defendant's employment; and that therefore the defendant was not liable for C.'s negligence.

DISTRICT COURT APPEAL.

Plaint to recover damages for injuries sustained by the plaintiff through the negligence of one Chaplin, the defendant's servant, in the management of a horse and buggy of the defendant.

Defence, that Chaplin was not defendant's servant at the time of the accident; secondly, that if he were a servant, he was not at the time transacting business for the defendant; thirdly, contributory negligence.

At the trial, on the 10th November, before Mr. District Court Judge *Dowling*, without a jury, it appeared that the plaintiff, a child seven years of age, had been knocked down and injured by a horse and buggy belonging to the defendant, which had been left by Chaplin unattended in the public street. While Chaplin was in a public-house, the horse was frightened, and bolted.

The defendant was the contractor for the Bondi sewer works. He was called on behalf of the plaintiff, and allowed to be treated as an adverse witness. His evidence was to the following effect:—Chaplin was his "manager," and had charge of his office and books, but had no outdoor employment. He went about the works, which extended over two miles in length, not according to exact instructions, but with defendant's knowledge. Chaplin had given orders to the men with his knowledge, and had gone about the works with him (defendant) for two years. Chaplin, being lame, had a horse and buggy of his own, which he kept at his private house, paying for the feed himself; it was not kept for use in the defendant's business. Though lame, he could get about on foot by the aid of irons, which he wore. He had no authority to use defendant's horse or buggy. Defendant went to New Zealand, and was away when the accident happened. He left Chaplin as manager in his absence. His principal duties were to attend to the office and the finances,

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v.
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and he would have to give orders to the men and supply them with material. He left a horse and buggy behind. Chaplin did not use them with his knowledge or consent or by his authority. If Chaplin took a cab, defendant did not pay for it.

Chaplin said he received 10*l.* a week as manager of works. He had a horse and buggy of his own, which he kept at his private residence. He paid defendant 10*s.* a week for horse-feed. His horse had been injured and his buggy smashed after the defendant's departure to New Zealand, and he used the defendant's horse and buggy. On the day of the accident in question he had called at the works to see what was doing. The public-house was not on his way home. He was going home from the works when he met a friend, turned back, and "adjourned" to the public-house with him. He put up the buggy just opposite the public-house (not at the door), and opposite to a shaft (part of the defendant's works). [This shaft was sunk for the purposes of excavation, and it appeared that the horse was frightened by some of the excavated stones rolling down.] Cross-examined: He used the buggy for his own convenience. His duty was to superintend the office work and the financial part of the concern. The defendant had no control over witness's movements when in a buggy. At the time of the accident (about 6 p.m.) he was not engaged on the defendant's business.

Collier, a horse-driver in the employ of the defendant, said he had seen Chaplin about the works nearly every day, and sometimes as late as 7 p.m. The men worked in day and night shifts.

Evidence having been given in proof of the accident, and the nature of the injuries sustained by the child,

G. B. Simpson moved for a nonsuit, on the ground that Chaplin, when the accident happened, was not on his master's business; that he had done his day's work and then turned back and gone on his own business. [The authorities cited will be found in the report of the arguments on the rule.]

The learned District Court Judge ruled:—"First. That there was ample evidence before him, regarding the lameness of

Mr. Chaplin and the length of the works, that defendant had impliedly allowed Mr. Chaplin to use a buggy and horse for despatch of Chaplin's work as manager to defendant, especially during his absence in New Zealand, it would be immaterial, therefore, whether the buggy and horse were the defendant's or any other person's. Secondly. That there was ample evidence of negligence in Chaplin leaving the horse and buggy as admitted by Chaplin and proved by independent witnesses. Thirdly. That there was no contributory negligence on the part of the child, for the evidence proved, beyond a doubt, that when the accident happened the child was on the pathway, where none, whether an adult or child, could anticipate a buggy would come." The Judge said "the only difficulty he had in deciding was whether Mr. Chaplin was on the defendant's business when the accident happened. The defendant allowed Chaplin to use a horse and buggy. The evidence proved that they were kept in a stable at the back of the gaol, in close proximity to the line of the works (sewer). It may fairly be presumed that Chaplin took the horse and buggy from his own stables that morning, and intended to return them to the same place the same evening. He admits he was on the works to see what was doing there just before the accident, and then started home, which would be less than half a mile. How far he proceeded was not in proof; but his object in returning was to get a drink, and, as there are many public-houses in the neighbourhood, it may be assumed he had not gone far. He therefore returned to the very works, merely making a little 'detour,' and not, as it is said in some of the cases, 'on a little frolic of his own.' The horse's head when left was toward the east, and by going up Liverpool-street would be the direct route to Chaplin's stables. The horse bolted up Liverpool-street a short distance, turned down into Forbes-street, crossed William-street, and at the chapel the accident happened. The Judge refused to nonsuit on any of the grounds taken (*Mitchell and Wife v. Crasweller*, 13 C.B. 237; *Venables v. Smith*, 2 Q.B.D. 283; *Rayner v. Mitchell*, 2 C.P.D. 359)."

Verdict for plaintiff, damages 50l. . . .

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1887. A rule *nisi* was granted on the grounds :—1st. That there
 JOHNSON was no legal liability in the defendant for the alleged negligence
 v. of Mr. Chaplin. 2nd. That there was no evidence that at the
 PRITCHARD. time of the act complained of, Mr. Chaplin was driving upon
 the defendant's business and with his authority.

G. B. Simpson, Q.C. (Pring with him), for the appellant, in support of the rule. There is no evidence to show that Chaplin was acting in his master's service or in the course of his employment when the accident occurred.

Teece appeared for the respondent, to show cause. He referred to the Judge's ruling.

G. B. Simpson, Q.C., objected to the arguments of District Court Judge being treated as part of his finding.

DARLEY, C.J. Mr *Teece* may adopt them as part of his own argument.

FAUCETT, J. For my part I think it very often useful that Judges do give their reasons for their findings.

Teece. It is no answer to an action of this kind, that a servant is acting in disobedience of the express instructions of his master : *Add. on Torts* (5th Ed.), p. 99. *Patten v. Rea* (1) shows that it is a question for the jury whether at the time the accident occurred the servant was going on his master's business. The evidence was that both Pritchard and Chaplin were constantly driving from one part of the works to another, to inspect their progress. Just before the accident he had driven to the works in the execution of his duty, and the fact that he made a detour and went to the public-house instead of going straight home does not absolve the master from liability : *Joel v. Morison* (2), *Sleath v. Wilson* (3). If there is evidence that Chaplin was acting in the course of his employment, then

(1) 26 L.J.C.P. 235 ; 2 C.B.N.S. 607.

(2) 6 C. & P. 501.

(3) 9 C. & P. 607.

Stevens v. Woodward (4) is in my favour. *Joel v. Morison* (2) has been cited with approval in more recent cases, such as *Mitchell v. Crasweller* (5), *Storey v. Ashton* (6), *Whatman v. Pearson* (7), and *Burns v. Poulson* (8). In *Whatman v. Pearson* (7) the accident was caused by the negligence of a carter, who, contrary to orders, went home to his dinner, leaving his cart unattended before his door. The horse ran away, and the master was held liable for the damage that ensued. In *Burns v. Poulson* (8) *Grove, J.*, says at p. 564: "Where the act is closely connected with the employment, must it not be a question for the jury?" Here the District Court Judge held that there was evidence that Chaplin, at the time of the accident, was acting in the course of his employment.

Simpson, in reply. *Stevens v. Woodward* 4) is in our favour. *Grove, J.*, says (at top of p. 321): "The act for which the master is liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform." Here the act which brought about the injury was the going into the public-house and having a drink with a friend. It might have been different if he had merely called in at a public-house on his way home. But his turning back after passing the public-house and going back, amounted to "a frolic of his own," as *Parke, B.*, expresses it in *Joel v. Morison* (2). Suppose he had stopped three hours instead of twenty minutes, could it be said then that the defendant was liable. In *Whatman v. Pearson* 7), the horse and cart were all day employed in the master's business. In *Mitchell v. Crasweller* (5), where the defendant's carman, having done his work, drove a fellow-servant in an opposite direction, and on his way back caused an injury by his negligent driving, the defendants were held not liable. In *Cormack v. Digby* (9), a herd got leave from his master to go for the day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the

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(4) 6 Q.B.D. 318.

(5) 22 L.J.C.P. 100; 13 C.B. 237.

(6) L.R. 4 Q.B. 476; 38 L.J. Q.B. 233.

(7) L.R. 3 C.P. 422.

(8) L.R. 8 C.P. 563.

(9) Ir. Rep. 9 C.L. 557.

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master assented, that he should bring home some meat from the town for the master. He drove so negligently that he injured the plaintiff. In an action against the master for the negligence of the servant, it was decided that the Court could not hold as a matter of law upon the evidence that the master was responsible for the negligence of the servant. In *Storey v. Ashton* (10), Cockburn, C.J. (at p. 479), says: "I am very far from saying, if the servant, when going on his master's business, took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey." Pritchard's evidence was that Chaplin's duties did not require him to use a horse and buggy. In *Patten v. Rea* (1), Cockburn, C.J., said: "It may make a difference if the servant was not obliged to go with the horse and gig;" and *Williams, J.*: "Was T. so employed that it was his duty to drive the gig?"

[FAUCETT, J. If I send a man on an urgent message to Ashfield, and pay him 1*l.* or 2*l.*, and he chooses to hire a horse, am I responsible for any accident that may occur?]

No. The question in this case really is whether, when Chaplin went into the public-house, he was acting in the course of his employment?

Cur. adv. vult.

Feb. 18. On Friday, Feb. 18th, the judgment of the Court was read by

Darley C.J.

DARLEY, C.J. We deferred giving judgment in this case till this morning, not because we had any doubt upon the law, but in order that we might have an opportunity of carefully considering the evidence. The principle of law applicable to this class of cases is well stated by Lord Coleridge, in delivering judgment in *Rayner v. Mitchell* (11). He says: "Whenever the master entrusts a horse and carriage, or anything which

may readily be made an influence of mischief, to his servant to be used by him in furtherance of his master's business or for the execution of his orders, the master will be responsible for the negligent management of the thing entrusted to the servant so long as the latter is using it or dealing with it in the ordinary course of his employment." It is also clear—in fact, the principle is incorporated in the above enunciation of the law—that if the servant is not, when he commits an injurious act, engaged in pursuing his master's employment, but in pursuing his own private ends, the master is not liable, and for this latter proposition the cases of *Mitchell v. Crasweller* (5), *Storey v. Ashton* (6); as also a recent case in Ireland, *Wilson v. Owens* (12), are authorities. *Whatman v. Pearson* may appear to be a conflicting decision, but in reality it is not so. In that case it is clear that when the accident occurred the servant was, as Mr. Justice *Byles* said, acting within the general scope of his authority to conduct the horse and cart during the day, and it was whilst acting in the course of his employment that the accident occurred. There is, in fact, no doubt as to the law; the difficulty in all these cases is as to its application.

Now, in this case the questions which arise are, first, was this horse and buggy expressly or impliedly entrusted to Chaplin to be used by him in furtherance of the defendant's business or for the execution of his orders? and, secondly, if they were, was Chaplin acting within the general scope of his authority when the accident occurred through the negligent act of Chaplin? We are of opinion that on the facts both these questions must be answered in the negative. The plaintiff called both the defendant and Chaplin as her witnesses, and this evidence was elicited. The defendant was in New Zealand when the accident occurred, having left Chaplin as manager in his absence, his principal duties being to attend to the office and the finances, to give orders to the men, and to supply them with material. Chaplin had a horse and buggy of his own, but the defendant did not know that Chaplin used this horse and buggy in the defendant's business, nor, indeed, did it appear that he did so. The defendant, when going to New Zealand, left a horse in a

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paddock, close to his residence. After the defendant's departure, Chaplin had his buggy destroyed, and his horse rendered useless, whereupon, without the defendant's knowledge, and without asking his consent, Chaplin took the defendant's horse out of the paddock and brought him to his own stables, and then drove him in a buggy, also of the defendant's. The defendant stated that neither Chaplin nor anyone else had authority to take this horse out of the paddock or use him. Now, under these circumstances, we think it is not possible successfully to contend that this horse and buggy were either expressly or impliedly entrusted by the defendant to Chaplin in furtherance of his (the defendant's) business or for the execution of the defendant's orders.

Assuming, however, that they were, we are of opinion that when this accident happened Chaplin was not acting in the course of defendant's employment, but was pursuing his own private ends. It appeared that on the day when the accident happened Chaplin was not on the works; that being out driving he called at the works as he went by, to see what was doing; that on his way home, his business for the day being at an end, he met a friend; that he then turned back, and with this friend "adjourned," as he said, to a public-house, leaving the horse unattended in the street; and that he remained in this public-house for 20 minutes, "shouting," as he said, for his friends. He further said that when he went to the public-house he was not on the defendant's business. Now, this is not the case of making a detour, as in the case of *Joel v. Morison* (2); but, as was said in that case, Chaplin was engaged in "a frolic of his own," without being at all engaged in the defendant's business. If on his journey home he had merely stopped at a public-house for refreshment, the case might have been different.

We are of opinion, therefore, that Chaplin, when he turned back and "adjourned" to this public-house and remained there drinking for 20 minutes with his friend, was not in any sense carrying out the defendant's employment. Accordingly, we think his Honour the District Court Judge ought, when asked, to have nonsuited the plaintiff, and that the defendant is now

entitled to have judgment entered up for him with costs, as also with the costs of this appeal.

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Appeal allowed.

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Attorneys for plaintiff: *Laurence & Rich.*

Attorney for defendant (appellant): *McLaughlin.*

THE FEDERAL BANK v. DAVIS.

Feb. 16.

Practice—Vacation business—Reg-Gen. 17th Dec., 1886, rule 25—No pleadings can be filed in vacation, even in actions upon bills of exchange, &c., without leave of a Judge.

Faucett J.
Manning, J.
and
Innes J.

By R. 25 of the *Reg-Gen.* of 17th Dec., 1886:—"During the vacations, no other business than that above specified will be taken without the leave of a Judge, nor shall any pleadings be filed or delivered without such leave, nor shall time run at law or in equity, except in the case of actions upon bills of exchange, promissory notes, and cheques, in which case time shall, for all purposes, run at law."

Held (Innes, J., dissenting), the exception only applied to time running, and that it was still necessary to obtain the leave of a Judge before filing pleadings in actions on bills, &c., as in other actions.

APPEAL from Chambers.

The plaintiffs filed a declaration in vacation against the defendant upon a promissory note, without obtaining the leave of a Judge. They subsequently signed judgment for want of appearance.

The defendants applied in Chambers to set aside that judgment, on the ground that the declaration had been filed without the leave of a Judge, as required by R. 25 of *Regulæ Generales* (17 Dec., 1886).

The old rule was—"During the vacations no other business than that above specified will be taken, and no pleading shall be filed or delivered without leave of a Judge, nor shall time run at law or in equity."

DARLEY, C.J. (at Chambers), on Feb. 11th, granted the defendant's application, holding that although it seemed

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unnecessary that a plaintiff should have and obtain the leave of a Judge to file his declaration on a bill of exchange, promissory note, or cheque, the rule made it necessary to obtain such leave.

Salomons, Q.C. (*O. B. Stephen* with him), in support of the appeal. The words in the rule, "except in the case of actions upon bills of exchange, &c.," apply to the filing of pleadings as well as to time running. The previous part of the rule is merely a repetition of the old rule, and the exception being engrafted on to the old rule as it formerly stood, applies to the whole of it. This is the reasonable construction of the rule which was intended to afford greater facilities for suing on bills, &c. If it were not so, this absurdity might arise: A plaintiff might file his declaration with the leave of a Judge; but the defendant, not being able to plead without leave, might refuse to obtain such leave and so defeat the object of the rule by not pleading at all. Moreover, if the defendant wants to plead, he can plead now, though they have made no affidavit of merits.

Secondly, if the leave of a Judge was necessary, it was only an irregularity and not a nullity.

Mann, for the defendant, in support of the ruling at Chambers. Under the old rule, pleas could be filed in vacation with the leave of a Judge, but time did not run. The effect of the exception is not to do away with the necessity of obtaining a Judge's leave to plead, but only to make time run. If it had been intended to render it unnecessary for plaintiffs in actions on promissory notes, &c., to obtain the leave of a Judge, the rule might have stopped at the word "cheques." The last words remove all doubt, and clearly limit the exception to time running only. As to the defendant not having pleaded, the defendant declined to accept the declaration, and told the plaintiffs that they ought to have obtained a Judge's order.

Salomons in reply. The rule was altered in compliance with a petition presented by the Chamber of Commerce, who were desirous of obtaining greater facilities for suing on negotiable

instruments. The construction of the rule contended for by the other side only perpetuates the restriction which they wished to get rid of.

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FAUCETT, J. The only question for us to consider is whether this rule was properly construed by his Honour the Chief Justice. The rules governing the Supreme Court proceedings this year have been altered, and the alteration affects this one. The old rule said that during vacation certain business should be done, and "no other business than that above specified shall be taken, and no pleadings shall be filed or delivered without the leave of the Judge." So far, then, the new rule is simply a repetition of the old one. Then the old rule went on, "nor shall time run at law or in equity." The new rule says, "no other business than that above specified will be taken without the leave of the Judge, nor shall any pleadings be filed or delivered without such leave." There is a repetition of the word "leave;" but these two clauses are the same as if they were promulgated in two distinct rules. In fact, the second part of the second clause is really included in the first, and it can only have been inserted for the purpose of making the matter clear, as pleading would be obviously included in the word "business." It is perfectly general, and applies to all pleadings in all actions. It does not say that in any particular kind of action a writ may be issued or pleadings filed or delivered without the leave of a Judge. It does not say that in any actions on promissory notes the pleadings may be filed or delivered without the leave of a Judge. It is a general and universal rule laid down in clear and unmistakable terms; and in my opinion means that no pleadings in any action shall be filed or delivered without the leave of a Judge.

Then we come to the next clause, "nor shall time run at law or in equity." There again is a general statement, and that is only a repetition of the old rule, which stopped there. Then comes the exception, and the question is: Does the exception apply to the former two clauses, or to the latter clause only? In my opinion it makes a distinct exception with reference to time running, and only to time running. If it were intended to say

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that the filing of declarations might take place in vacations without the leave of a Judge, there would have been a proviso to that effect. Unfortunately, whether that was intended or not, the rule did not say so. I see no reason why it should be intended to include that. What injury has been done? Before this rule was framed a plaintiff could issue a writ, but he could not file his declaration in vacation. Now, by this rule, he can.

It is contended that on this construction of the rule the defendant might refuse to obtain leave of a Judge, without which he could not plead. But if he does not file his plea, by leave of a Judge, within the proper number of days, time would run against him, and judgment could be signed for want of a plea.

The plaintiff gets this benefit, that he can go on in vacation as if it were not vacation. But this condition is affixed to that privilege, namely, that he must obtain leave of a Judge. The alteration with regard to the running of time was made at the suggestion of the Chamber of Commerce, and I think the amendment of the rule was a very wise one to enable the holders of promissory notes to obtain what they are clearly entitled to after the money becomes due. They can obtain leave from a Judge in vacation to proceed, and the action can go on. Under this rule the action goes on and time runs, and that gives everything that the Chamber of Commerce asked for.

I cannot see how we can construe the rule against its grammatical construction. If we find that to be fair and reasonable, we are bound to adopt it. Therefore, I am of opinion that his Honour the Chief Justice was right in his construction of the rule.

Manning, J. SIR W. MANNING, J. I am entirely of the same opinion. The construction put upon the rule by his Honour the Chief Justice is not only the grammatical one, but, as I think, the one which was intended. The obstacle which the rule was intended to remove was the difficulty as to time running. There was no question at all as to altering the old rule, otherwise than by an exception, to be engrafted at the end, limiting that part of it which said that time was not to run in vacation in cases other

than actions on bills, &c. Accordingly, the rule now in question contains every word of the earlier rule exactly as it stood, and only adds the exception; and thus the requirement that the leave of a Judge must be obtained before pleadings can be filed, stands untouched. The two things are perfectly different. The new rule adopts the suggestion of the Chamber of Commerce, namely, that time should run in vacation as well as in term. Not only is the word "nor" disjunctive, but the nature of the things are different. The requirement of leave from a Judge is, so to speak, matter for human action; and it is to be assumed that in every case in which leave is required, and ought in justice to be granted, it will be obtained from some Judge; for one, at least, of the Judges is supposed to be, and ought to be, within reach for all judicial requirements. Whereas a rule of Court which declares that time shall not run at any season is an obstacle which cannot be overcome in any way so long as the rule lasts. The object of the change was to meet the difficulty of time not running in vacation, which was an insuperable bar to the prosecution of an action; but as regards the obtaining of a Judge's leave, there is really no difficulty under the rule as amended, as far as the plaintiff is concerned; for he can choose his own time to find a Judge; and when he has obtained the leave and filed his declaration, the time will run. He is put to a little expense and trouble, and that is all. On the part of the defendant, it must indeed be admitted that a difficulty might arise in those comparatively few cases in which he ought to be admitted to plead to an action on a bill, &c.; because he might be in difficulties by the time running against him in the event, if such may be supposed, of no Judge being accessible at the required moment. But that was not provided for.

SIR G. INNES, J. I regret to say that I am unable to concur with their Honours in the decision at which they have arrived. It has been said at the bar that his Honour the Chief Justice thought the matter was one of considerable difficulty, and that opinion I share. I thought this rule was made upon representations by mercantile men and others, who might be holders of promissory notes, bills of exchange, and cheques—upon petition

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indeed from the Chamber of Commerce—that the long vacation operated with undue prejudice to their rights if they were delayed in suing upon such instruments, and that to remove that cause of complaint was the object of the rule—to remove entirely the disabilities attaching to such actions by reason of the vacation. In other words, that the vacation was in such actions to be not a vacation, and that such actions should be prosecuted as well in vacation as out of vacation. Out of vacation we know that no leave of a Judge is required to file or deliver a declaration in cases of promissory notes or bills of exchange or cheques, and in or out of vacation the requiring leave of a Judge to file a declaration in such case can be effective for no other earthly purpose than to heap up needless expense. The Legislature, both Imperial and colonial, have recognised the importance to plaintiffs in such cases of expedition in the enforcement of their claims.

If I am right as to my view of the intention and object of the rule, the intention has not been carried out—the object has not been attained—by the construction now put upon the rule. I am unable to think that the case is so free from doubt as their Honours think; for while, on the one hand, Mr. *Mann's* argument was strengthened by the concluding words of the rule, “In which case time shall for all purposes run at law”—on the other hand, I see great difficulty in limiting the application of the word “except” to one of two immediately preceding alternatives—two alternatives bracketed together by the use of the two “nors.” “An two men ride of a horse, one must ride behind:” but it is the same horse that carries both; and if two alternatives are stated in sequence one must be stated before the other. But why the preposition “except”—equally applicable to both—should be held to apply to one and not to the other, I fail to see, unless the concluding word which I have adverted to clearly so limit its application.

Moreover, it strikes me that had the rule been intended to be construed as it is now interpreted by the Court, it should have been differently framed, and the matter as to time running should have been provided for in an entirely distinct sentence. For these reasons, though of course with very great regret, and

not without very great doubt on the grammatical construction of the rule,—still, looking at the admitted object and intention of the rule, I am constrained to differ from the majority of the Court.

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The appeal was dismissed with costs.

Salomons asked for leave to file the declaration afresh.

Mann said that immediately on the plaintiff's judgment being set aside in Chambers, the defendant had signed judgment of *non pros*. He must oppose the application, unless the plaintiffs agreed to pay the cost of the judgment of *non pros*.

Salomons thereupon moved for a rule *nisi* to set aside the judgment of *non pros*, with costs, and to give the plaintiff bank permission to file another declaration.

The rule *nisi* was granted.

On Friday, March 10th, the rule came on for argument, and the Court being of opinion that it was sharp practice to have signed the judgment of *non pros* under the circumstances, made the rule absolute, costs to be costs in the cause.

March 10.

Attorneys for plaintiff : *Fisher, Ralfe & Salwey*.

Attorneys for defendant : *R. B. Smith & Smith*.

JACOBS v. SMITH.

Feb. 17.

Assignment of estate in trust for creditors—Action by non-assenting creditor—Pleading—Sufficiency of averment that the plaintiff's name appeared in the schedule of creditors under ss. 38 and 35 of 5 Vic. No. 9—Amendment of pleadings on demurrer.

Darley C.J.
Faucett J.
and
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To an action on a promissory note the defendant pleaded a deed of assignment "in conformity with the Act," 5 Vic. No. 9 (ss. 33 and 35), and a deed of covenant to release the defendant from all debts, &c., and all actions, &c., in respect thereof. The plea set out that the deed of assignment was made "between the defendant of the first part, and A. B. and C. D., trustees of the second part, and the several persons and bodies corporate creditors of the

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Held, on demurrer, that the plea was good; but that it would be better to amend it by inserting the words "being all the" before the word "creditors." And the amendment was allowed to be made.

Held also, that the words "in conformity with the Act" governed the second deed (of covenant to release) as well as the first, and that, therefore, it was to be presumed, though there was no allegation in the plea to that effect, that the plaintiff's name was in the schedule as required by the Act. An amendment was also allowed on this point.

PER CURIAM. Where a purely technical point is taken, the Court will allow an amendment to be made on demurrer.

DECLARATION ON a promissory note.

PLEA: That after the accruing of the alleged causes of action, a deed of assignment, dated the 20th day of August, 1886, under, and by virtue of, and in conformity with, the provisions of the Act 5 Vic. No. 9, was made between the defendant of the first part, T. D., E. K., and J. B. (trustees) of the second part, and the several persons and bodies corporate, [*being all the*] creditors of the defendant, whose names were mentioned in the first schedule to the said deed, of the third part, whereby the defendant assigned all his estate and effects whatsoever to the said T. D., E. K., and J. B., as trustees for the benefit of the said parties of the third part, [*and in the said schedule the name of the actual holder of the promissory note herein sued upon, being then unknown to the defendant, the said fact was stated in the said schedule, with the amount of such note, and the date when the same would fall due, and the name of the last known holder, being the said F. T., and of the immediate parties thereto;*] and the defendant avers that the said deed was duly executed by four-fifths of the said creditors of the defendant in number and value (not reckoning among the creditors any creditor whose debt was under fifty pounds), and was executed by the said trustees and by the defendant in the presence of, and was attested by, a justice of the peace, and notice thereof, attested in like manner, and stating truly where such deed was lying for inspection and execution, was within fourteen days next after such execution published in the *Government Gazette* and one other newspaper published in Sydney, and whereunto was annexed a true and particular account of all the property of the

defendant as required by the provisions of the said Act; and the defendant further avers that, subsequently to the execution of the said deed, a deed of covenant, dated the 20th August, A.D. 1886, was made between the said trustees of the first part, the said creditors of the defendant of the second part, and the defendant of the third part, and was duly executed by four-fifths in number and value of the said creditors of the defendant (not reckoning in number any creditor whose debt was under fifty pounds); and the said deed was made in connection with the said deed of assignment, and after reciting that by the said deed of assignment the defendant had assigned, released, and assured unto the said trustees all his real and personal estate and effects upon certain trusts for the benefit of his said creditors, and further reciting that on the execution of the said deed of assignment it was agreed by and between the said parties thereto that if the defendant should during the period of three years thence next ensuing pay to the said trustees for the benefit of all his said creditors all moneys received by him as salary, except as therein is mentioned, and if the defendant should faithfully observe and perform all covenants, conditions, and agreements contained in the said deed of assignment, on the defendant's part to be observed, kept, and performed, the said parties of the first and second parts, being the said trustees and the said creditors, would give, grant, execute, and deliver unto the defendant a good and valid release from all debts due by him to the said parties upon any account whatsoever at the date of the said deed, the said parties of the first and second parts, being the said trustees and the said creditors of the defendant, did, and each of them did thereby, in consideration of the defendant having executed the said deed of assignment, covenant, promise, and agree with the defendant that they, the said parties of the first and second parts, should and would, subject to the performance and observance of the covenants thereafter contained by the defendant, at the expiration of three years thence next ensuing, execute and deliver to him a good, valid, and sufficient release and discharge of and from all debts, liabilities, claims, and demands, then owing or accruing due by him to them at the date of the said deed, and from all actions, suits, reckonings, claims,

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and demands for or in respect thereof respectively, including the said causes of action; and the defendant avers that he has duly kept, observed, and performed all covenants and promises on his part in the said deeds contained, and paid all moneys as required by the said deeds, yet the plaintiff is suing the defendant in respect of the said causes of action contrary to the provisions of the said deed of assignment.

Demurrer and joinder in demurrer.

Cohen for the plaintiff. The plea does not disclose facts which are an answer to this action. First, it is not expressly alleged that the assignment was for the benefit of "all his creditors." The deed purports to be executed by and for the benefit of certain persons, "creditors of the defendant, whose names were mentioned in the first schedule." The plea should aver affirmatively either that the assignment was for the benefit of "all" his creditors, or that the plaintiff's name was in the schedule. Secondly, the plea does not show that the plaintiff himself released the defendant from the causes of action set out in the declaration. The plaintiff, as a matter of fact, was not an assenting creditor. But under s. 35 the defendant must expressly allege in his plea that the plaintiff's name was in the schedule, or that he was an assenting creditor under the Act 5 Vic. No. 9, s. 33. There must be an immediate and absolute release, and not a promise only. The creditors to be bound by the covenant to release must be "named in the schedule." [INNES, J. Does not the due execution of the deed imply that the schedule complied with the provisions of the Act?] Thirdly, the plea does not state, in reference to outstanding promissory notes, that the particulars required by the proviso of s. 33 appeared in the schedule. [FAUCETT, J. The question is whether the defendant should aver this in the plea, or the plaintiff allege the contrary in his replication.] The defendant should aver it. To deprive the plaintiff of a right the defendant must show a strict compliance with the Act—that is to say, he must show on the face of the plea that the deed complied with the requirements of 5 Vic. No. 9, ss. 33 and 35. [DARLEY, C.J. Where you rely on a statute to defeat a cause of action, no doubt

the details of compliance with that statute must be shown.] It is for the defendant to show on the pleadings that the plaintiff was bound as a non-assenting creditor. It is for the defendant to prove that the plaintiff was bound by the deeds. As the onus of proof lies on the defendant, he must lay the basis of that proof by including this affirmative allegation in his plea.

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O. B. Stephen for the defendant in support of the plea. The defendant is bound to prove either that the plaintiff was an assenting creditor, or that his name is in the schedule, provided such deed shall have been executed by not less than four-fifths in number and value of his creditors. [DARLEY, C.J. The plea does not aver that the names in the schedule are the names of "all" the creditors.] But the plea alleges that the deed of assignment was executed in conformity with the Act, and that implies the necessary entries in the schedule. The objection is hypercritical. General averments are in favour now in pleading under the *Common Law Procedure Act*, as in cases under the Land Acts. [DARLEY, C.J. In *Beauchamp v. Waller* (1) the averment, which it is contended should be in the plea now under consideration, was included in the plea.] In *Manson v. Levy* (2) the form of plea is not given. Of course the defendant would fail unless he proved that his deed was in conformity with the Act. [DARLEY, C.J. Can we not amend now? INNES, J. If we think it right to amend, Mr. *Cohen* may claim costs on the demurrer. DARLEY, C.J. In *Boast v. Firth* (3) an amendment was made during the argument of the demurrer (4).] As to the other point, s. 35 of 5 Vic. No. 9 shows what amounts to be a release.

Cohen in reply. How can a creditor be bound unless he is a party to the deed? [FAUCETT, J. S. 35 is a complement to s. 33.] The plea states that the first deed was executed in conformity with the Act, but it does not state that the second deed was. [FAUCETT, J. The two deeds are to be read together. It is immaterial whether or not they are stated separately to be in

(1) 5 S.C.R. 1.

(2) 8 S.C.R. 39.

(3) L.R. 4 C.P. 1.

(4) The plea was amended by introducing the words printed in italics.

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conformity with the Act, as it is averred that the latter deed was made "in connection with" the deed of assignment.]

DARLEY, C.J. I think the defendant is entitled to judgment on this demurrer. To a declaration on a promissory note the defendant pleaded a deed of assignment, executed under ss. 33 and 35 of 5 Vic. No. 9. The plea states that the deed was executed in conformity with the Act; and I apprehend that that allegation, which is a material one, cannot be proved unless it is shown that the defendant executed a conveyance to trustees of "all his estate and effects;" and, secondly, that such conveyance was for the benefit of "all his creditors." I confess I think that it would have been better if the plea had stated in terms that the deed was executed for the benefit of "all" the creditors; and in order to avoid any difficulty at the trial it may be advisable to have the plea amended. We propose, therefore, to allow an amendment by inserting the allegation that the deed was executed for the benefit of "all" his creditors, and also averments that the requirements of the proviso of s. 33 have been complied with. It is quite clear that the powers of amendment given by the *Common Law Procedure Act* of 1852 are general enough to enable the Court to amend the pleadings during the argument of a demurrer, although I am not aware that it has ever been done in the colony. When at the bar I often pressed for that course to be adopted, but without success. By s. 172 of the *Common Law Procedure Act*, 1853, it is enacted that "it shall be lawful for the Court and every Judge thereof . . . at all times to amend all defects and errors in any proceeding in civil causes . . . and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." That is quite general enough to include amendments on demurrer. Then comes the case of *Boast v. Firth* (3), in which, the plea being amended, judgment was given for the defendant. I think it is well it should be understood that the Court, where a purely technical point is taken, will allow an amendment to be made during the argument on demurrer.

As to the second point, that the plea should have shown that the plaintiff was actually named in the schedule, I am of opinion that the words "in conformity with the Act" govern the second deed as well as the first; and that the words "the said creditors" mean "all the creditors," because it is alleged that the deed was executed in conformity with the Act.

On these grounds I think the plea sustainable; but, in order to avoid any difficulty at the trial, I think it should be amended in the way in which we have suggested. Judgment, therefore, will be for the defendant.

FAUCETT, J. I concur with his Honour the *Chief Justice*, but I think it is unnecessary to amend. The plea sufficiently shows that the first deed was executed for the benefit of "all" the creditors; and it also seems to be in substance stated that the deed was executed by four-fifths of the creditors. But as to the last part, I think the amendment, though not necessary, is nevertheless desirable. As it is stated that a deed of covenant to release was executed in conformity with the former deed, we must take the two deeds as one. We must give these things a fair substantial meaning. If the defendant did not prove that the plaintiff's name appeared in the schedule, I should not consider that the defendant could succeed in proving his plea, because this would be necessary under the statute. However, I am of opinion that this plea is a substantial answer to the plaintiff's claim.

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SIR G. INNES, J. I am of the same opinion; although for my part I do not think that the proposed amendments are necessary. But for more abundant caution I think it advisable to insert the amendments to meet the objections so ingeniously urged by Mr. *Cohen*.

Judgment for defendant.

Attorneys for plaintiff: *Levy & Hemsley*.

Attorneys for defendant: *Jones & Jones*.

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THE BENDEMEER TIN MINING CO. v. NEWTON.

Feb. 17.

Company—Action for calls—Plea of alleged misrepresentation by directors that the calls would be devoted to a certain purpose—No allegation of fraud—No repudiation of shares.

Darley C.J.
Faucett J.
and
Innes J.

To an action for calls on shares in a limited company, the defendant, a shareholder, pleaded that the plaintiff company, in order to induce him to buy the shares of one H., represented to the defendant that if he would purchase H.'s shares the call then due and all future calls would be applied for the purpose of developing the property, and the plea went on to aver that the said calls sued for were made by the directors for the purpose of reducing their indebtedness, and that nothing would be left for the development of the property, and the defendant's shares would become wholly useless to him.

Held, on demurrer, that the plea was no answer to the action, as no fraudulent misrepresentation of an existing fact was alleged. The defendant's remedy was a suit in equity for specific performance.

DECLARATION by plaintiff company against the defendant, a member and shareholder of the said company, for calls upon shares.

PLEA (on equitable grounds) that at the time of the purchase of the shares by the defendant hereinafter mentioned the directors of the plaintiff company had made a call of threepence per share, which one C. Haager, the then proprietor of eight thousand shares, paid up to nineteen shillings and threepence per share in the plaintiff company, was unable to pay, and the plaintiff company then, in order to enable the said C. Haager to sell his said shares to a person who would be in a position to pay the said call and other calls, amounting in all to sixpence a share, which might afterwards be made; and so that a person who was able to contribute towards the expenses and debt of the plaintiff company might be substituted in their books for a person who was not so able, and in order to induce the defendant to become the purchaser of the said eight thousand shares, represented to the defendant that if he would purchase the said shares from the said C. Haager and pay to the plaintiff company the said call then due on the said shares, the said call would be applied, not for the purpose of paying off or reducing any then indebtedness of the plaintiff company, but, together with all moneys received from any future calls, for the purpose of developing the property

of the plaintiff company, and not otherwise. And the defendant says that, relying upon the said representation, he did buy the said eight thousand shares from the said C. Haager, and did pay the said call to the plaintiff company. And the defendant says that the directors of the plaintiff company, in fraud of their said representations, applied the said call wholly in reducing the then indebtedness of the company, for which the said directors were then liable individually. And the defendant says that the said calls herein sued for are made by the said directors for the purpose of further reducing the said indebtedness, and there will be nothing left for the development of the property of the said company, and the defendant's shares will become wholly valueless to him.

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Demurrer on the grounds—1. That the said plea does not disclose any fraudulent misrepresentation of any existing fact which would entitle the defendant to be relieved at law or equity from his liability for the said calls. 2. That the said plea alleges at most (if at all) a breach of a promise by the plaintiffs, for which the plaintiffs could only be liable in damages, and such alleged breach is no answer to the plaintiff's action, either at law or equity. 3. That the said plea does not show any departure by the plaintiffs from the alleged representations, or any breach of any alleged promise by the plaintiffs so far as the calls sued for are concerned. 4. That the said plea does not disclose any fraud on the part of the plaintiffs. 5. That the plea does not disclose circumstances under which a Court of equity would grant an absolute and unconditional injunction against the maintenance of the action. 6. That the said plea confesses and does not avoid the causes of action in the declaration alleged.

Joinder in demurrer.

Cohen, in support of the demurrer, merely submitted the above points, and referred to *Bullen v. Leake* (3rd Ed.), p. 587, to show that it was essential that on the discovery of a fraud there should be prompt repudiation, which was not alleged in the plea.

O'Connor, for the defendant, in support of the plea. The issue of fraud is fairly raised on the pleadings. If we can show that

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THE If new shares are issued on the understanding that the proceeds
BENDEMEER are to be devoted to particular purposes. He cited *Edgington v.*
TIN MINING *Fitzmaurice* (1). [DARLEY, C.J. Is not the defendant's remedy
 Co. to file a statement of claim in equity to force the directors to
 v. apply the money paid to the purpose promised ?] Yes, but here
NEWTON. I contend that the plea alleges fraudulent misrepresentation of
 an intention. If it had been a promise, that word would have
 been used. The plea would at any rate be an answer to the
 declaration if the word "fraudulently" is inserted before the
 word "represented."

Cohen was not called upon to reply.

Darley C.J. DARLEY, C.J. The plea cannot be supported, fraud not being alleged. It is clear that the defendant, as a shareholder, has not repudiated his contract in any way, but still remains a shareholder. The plea alleges a promise that the calls would be devoted to a certain purpose, but that is no answer to an action for calls. The defendant's remedy clearly is to commence a suit in equity, claiming that the moneys shall be applied as he alleges they should be ; and that Court may give him damages if he can show he has sustained any. I think the plea is bad, and the demurrer must be upheld.

Faucett J. FAUCETT and SIR G. INNES, JJ., concurred.
 and
Innes J.

Judgment for plaintiffs.

Attorney for plaintiffs : *E. Meyer.*

Attorneys for defendant : *Shepherd & Crossman.*

THE QUEEN v. ROSE.

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Forgery—Criminal Law Amendment Act (46 Vic. No. 17), sec. 253—Authority for payment of money—Practice—Notice to prisoner of hearing of Crown case reserved.

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Darley C.J.
Faucett J.
and
Innes J.

A forged letter, which would be a good voucher if signed by the person by whom it purports to be signed, is an authority for the payment of money under sec. 253 of the *Criminal Law Amendment Act* (46 Vic. No. 17).

Per curiam: A prisoner should in all cases have notice when his case will be argued.

SPECIAL case stated by Mr. District Court Judge *Murray*, Chairman of Quarter Sessions:—

"The prisoner was tried before me, at the Port Macquarie Quarter Sessions, held yesterday, on an information charging him with forging a 'warrant order, authority, and request, for the payment of money.' There was a second count for uttering.

"The information was intended to charge an offence provided for by section 253 of the *Criminal Law Amendment Act* of 1883.

"A paper writing, purporting to be a letter written by one John Barrie to Rose, the accused, was put in evidence as the writing charged to be forged. It was proved that this paper was shown by Rose to the Mr. Hibbard apparently mentioned therein. Believing it to be Barrie's handwriting, Hibbard gave Rose the sum of 12*l*. Rose was convicted, and is now under sentence.

"The question for the consideration of the honourable the Supreme Court is: Whether this writing constitutes an 'authority' within the intention of the section? I thought it was sufficient in form to satisfy the meaning of the word, and so directed the jury; but, having some doubt, I reserved the point. The prisoner was undefended.

"The following is a copy of the letter:—'Crescent Head, January 12th, 1886. Dear James—I write these few lines to let you know that Mr. Hibbard is going to Sydney; and also the case with McDonald and me is coming off in Sydney about the middle of February at the Supreme Court, and you are my main witness in it. It's not worth while coming back until it's over. The team is working drawing girders. You say that you are getting short of money; you can draw the remainder from Mr.

1897. Hibbard in Sydney. His office is in Pitt-street. Mr. R. Kemp is his agent. He will tell you where Mr. Hibbard will stay. The old order I gave you here will do now. There is 24l. in his hands yet. You can draw that till I see you in Sydney. Will be there some time in February.—Yours truly (Signed), JOHN BARRIE.”

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Fitzhardinge appeared for the Crown.

The prisoner was not represented.

[SIR G. INNES, J. Has the prisoner received notice of this application ?]

Fitzhardinge. No, your Honour. He was undefended, and the point was raised in his interest.

[DARLEY, C.J. We think the prisoner should, in all cases, have notice when his case will be argued.]

Fitzhardinge referred the Court to the case of *R. v. Rogers* (1), in which a prisoner was convicted for forging a document in the following words :—“ Oct. 11, 1839. This is to satisfy that R. Rogers as swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria (a steam vessel), 4l. 10s. (Signed), J. NICHOLSON.”

Darley C.J. DARLEY, C.J. We think the conviction must be upheld. Section 253 of the *Criminal Law Amendment Act* says : “ Whosoever forges or utters . . . any undertaking, warrant, order, authority, or request, for the payment of money . . . shall be liable to penal servitude for ten years.” The only question is : Is this an authority for the payment of money? [His Honour read the letter set out in the special case.] It appears to me that that is clearly an order or authority for the payment of money ; if it had been really written by Barrie, it would have been a good voucher.

Faucett J.
and
Innes J.

FAUCETT and SIR G. INNES, JJ., concurred.

Conviction upheld.

THE QUEEN v. BRADFORD AND FORBES.

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Feb. 18.

Criminal law—Conspiracy to defraud—Evidence of other acts tending to show general conspiracy—Election by Crown—Criminal Law Amendment Act (46 Vic. No. 17), s. 331—Other persons, names unknown, jointly charged—No evidence as to such other persons.

*Darley C.J.
Faucett J.
and
Innes J*

Where two prisoners were charged upon an information for conspiracy to defraud, "that they did amongst themselves, and with divers other persons, whose names are to the Attorney-General unknown, conspire together to cheat and defraud,"

Held, that the Crown was not restricted to the proof of that one particular act of fraud, but that evidence could be given of other overt acts tending to show that similar fraudulent practices had been resorted to on other occasions, showing that the prisoners had been carrying out a general conspiracy to defraud.

Held also, that the Crown could not be put to its election as to which particular act of conspiracy should be proved.

Held further, that, the Crown having shown that the two prisoners conspired together, it was not necessary to prove that "other persons" had been engaged in the conspiracy. Conviction upheld.

SPECIAL case stated by *Windeyer, J.* :—

"These prisoners were tried before me on the seventeenth day of November, at the late criminal sittings at Darlinghurst, upon an information charging that they did amongst themselves, and divers other persons whose names are to the Attorney-General unknown, conspire together to cheat and defraud the municipal council of Sydney of divers large sums of money.

"The prisoner Bradford, it appeared from the evidence, was member of a firm styled 'D. & R. Bradford' that had a contract to supply the municipal council of Sydney with iron castings for the waterworks of Sydney. The prisoner Forbes was a clerk in the employment of the firm.

"The mode of dealing between the corporation and D. & R. Bradford was as follows :—When castings of any kind were wanted, one J. N. Walton, the storekeeper for the corporation at Crown-street reservoir, drew up a requisition slip for the articles required, and sent it to the city engineer, Walton keeping a requisition book, and entering a copy of the requisition on the butt of it. A requisition was then made out for the articles in the engineer's office upon the firm of D. & R. Bradford, which

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requisition was given to Walton by the clerk in the engineer's office, and compared by Walton with his butt, and when found to agree with it, the requisition was given to the Bradfords. The articles were then delivered to Walton in accordance with the requisition, not always in full, but never in excess of the requisition. When delivered they were weighed by Walton, and the weights sent to the Bradfords. The vouchers—that is, the bills for the articles—were then brought to Walton, together with the requisition. Walton then checked the account by comparing it with the requisition and with his book. Walton then initialled the account and signed the requisition—on the face of it, if it had been supplied in full, and on the back of it, if only partly complied with—and handed the account, so initialled, to the prisoners, who it was proved were always in company when they brought the vouchers to Walton.

“It appeared from the evidence that after the accounts and requisition had been so initialled and signed by Walton that the genuine documents were either destroyed and fresh ones substituted, containing a much larger number of articles than were originally supplied, and a forged initial and signature of Walton put to them, or the original figures were altered so as to make it appear that a much larger quantity of articles had been ordered and supplied. In consequence of no check being kept in the offices of the corporation, by comparing the vouchers and requisitions supposed to be initialled and signed by Walton with the copy of the requisitions kept in the engineer's office, the prisoners, who always came together for the payment of the vouchers, obtained sums of money largely in excess of what they were entitled to; and the corporation was thus defrauded to a considerable extent. The evidence as to the forgeries of Walton's name having been effected by Forbes was clear, and there was ample evidence, from the actings and confessions of the prisoners, that they were acting together in the matter, and to justify the inference that they had conspired together to defraud the corporation. There was, however, no evidence given to show that there were other persons acting with the prisoners. In the course of the prosecution, evidence was tendered to show that this kind of fraudulent practice of

substituting forged requisitions and accounts, which I have described, had been resorted to more than once by the prisoners.

"This was objected to on behalf of the prisoners as showing distinct conspiracies, but I admitted the evidence as evidence of overt acts from which the jury might infer the existence of one general conspiracy to defraud the corporation in their dealings with D. & R. Bradford, and going to rebut the idea that the alteration of a few figures in one document had perhaps arisen only from some innocent mistake or carelessness; the admission of such evidence appearing to me, moreover, to be justified by the case of *Rex v. Roberts* (1).

"I was further asked, with reference to these several overt acts that I have described, to put the Crown to its election under section 331 of the *Criminal Law Amendment Act*, as to which conspiracy, as it was termed, it would proceed.

"This I refused to do, as I did not consider the several instances of the manipulations of the requisitions and accounts by the prisoners, which were given in evidence, to show with other evidence the existence of a conspiracy to defraud, as conspiracies 'substantially different' within the meaning of section 331, but as actings of the prisoners, from which the existence of the one conspiracy charged might be inferred.

"I was further asked to tell the jury that as the information charged the prisoners with conspiracy among themselves and with divers other persons whose names were to the Attorney-General unknown, the evidence given in the case did not support it, as there was no evidence of other persons being engaged in the conspiracy, and that, therefore, the prisoners should be acquitted.

"This I refused to do, telling the jury that they could convict the prisoners if they found that there was a conspiracy between themselves to defraud the corporation in their dealings with the firm of D. & R. Bradford.

"The prisoners having been convicted, the questions which I have been asked to reserve for the consideration of the Court are, whether I was right—

"1. In admitting the evidence which I did.

(1) 1 Campbell 399.

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"2. In refusing to put the Crown to an election.

"3. In holding that the prisoners could be convicted though no evidence was given of any other persons being concerned in the conspiracy."

Salomons, Q.C., and Teece appeared for the Crown.

No appearance for the prisoners.

Salomons, Q.C. The first point is, that the Crown was limited to the proof of the conspiracy in respect of one voucher. The very point arose in *Rex v. Roberts* (1). The charge is conspiracy to defraud. If the Crown were limited to one case the jury might say it was a mistake. It is only by cumulative instances that the charge of the conspiracy to defraud is made out. As to the second point, that under section 331 of the *Criminal Law Amendment Act* (2), the Crown must be put to its election as to which act of fraud it would proceed upon. The question is irrelevant. As to the third point, the proper course would have been for the prisoners to have applied for particulars.

Darley C.J. DARLEY, C.J. In this case the prisoners were indicted, together with other persons to the Attorney-General unknown, for that they "did amongst themselves and with divers persons whose names are to the Attorney-General unknown, conspire together to cheat and defraud the municipal council of Sydney of divers large sums of money." The first objection taken was that his Honour the Judge had admitted evidence of certain vouchers under circumstances fully detailed in his Honour's

(2) 46 Vic. No. 17, s. 331:—It shall not be necessary, in an indictment for conspiracy, to state any overt act; and each defendant, in any case of conspiracy (whether two or more defendants are included in the same indictment or not), may be charged separately, in any count, as having conspired with divers persons, of whom it will be sufficient to name one only—or as having conspired with one other named person only—and may be convicted on such count, upon proof of his having unlawfully conspired for

the purpose therein alleged with any one such person. Provided always that no more than three counts against the same defendant shall be inserted on any such indictment, and that the Court may, in any case, before plea pleaded, order such particulars to be given as to such Court shall seem meet, and that, where conspiracies substantially different are charged in the same indictment, the prosecutor may be put to his election as to the one on which he will proceed.

statement of the case. It is not necessary to refer to the matter at any length, but it appears to be shortly this: A voucher was put in evidence and clearly proved to be a forgery; and it was also clearly proved that the prisoners had conspired together to obtain money from the corporation upon that document. Other documents of exactly similar nature were then put in evidence, upon which money had also been obtained.

It appears to me that although the Crown confined itself in the indictment to one act of conspiracy, the other documents were clearly admissible as evidence of overt acts on the part of the prisoners, showing that they had been carrying out a general conspiracy to defraud the corporation by this mode of procedure. There were not several conspiracies, but one conspiracy by general acts to defraud the corporation. I think, therefore, that his Honour Mr. Justice *Windeyer* was perfectly right in admitting the evidence.

As to the second point—which is involved in the first—there was no election to put the Crown to.

As to the third point—it appears to me that, the Crown having shown that the two prisoners conspired together, it was quite unnecessary for the Crown to show that any other persons had conspired with them. A conspiracy has been clearly proved against the prisoners. I think his Honour was quite right in the view he took of the case. The conviction must be upheld.

FAUCETT, J. I am of the same opinion. The words of the information follow exactly the words laid down in the forms made under the Act of Parliament, and which therefore have the force of an Act of Parliament. All the acts were in pursuance of the same conspiracy.

Faucett J.

As to the third point—if three persons are charged with murder and one is found to be innocent, the conviction of the others is not therefore bad; so if four persons are charged with conspiracy to murder, the same principle applies. So in the present case the conviction must be upheld.

SIR G. INNES, J. I concur. Granted that the information is correctly laid, there is nothing in any of these points.

Innes J.

Conviction upheld.

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THE QUEEN v. HUNT AND OLLIVIER.

Feb. 18. *Criminal law—Evidence—Statement by prisoner made on former trial admissible in evidence against him—Criminal Law Amendment Act (46 Vic. No. 17), s. 470.*

Darley C.J.
Faucett J.
and
Innes J.

A statement made by a prisoner under s. 470 of 46 Vic. No. 17, on a former trial, when the jury disagreed, is admissible in evidence against him at the second trial.

SPECIAL case was stated by Mr. M. H. Stephen, Q.C., Acting Judge:—

“Vere Hunt and Welby Morton Ollivier were tried before me at the last gaol delivery at Darlinghurst, the former upon a charge of making a false entry with intent to defraud, the latter with being an accessory before the fact.

“The prisoners had previously been tried on the same charges before his Honour Mr. Justice Windeyer.

“The prisoner Ollivier, on that occasion, made a statement implicating himself, but exculpating Hunt. No verdict was then returned, the jury having disagreed.

“At the trial before me, the Crown tendered, in evidence as against Ollivier, the before mentioned statement. The prisoner Ollivier objected to its reception, and so did the counsel for Hunt. I admitted it in evidence as against Ollivier. I was requested to reserve the point whether I was right in admitting the statement.

“Both prisoners were convicted.

“The question for the Court is, whether the statement was admissible, and whether the prisoners, or either of them, were wrongly convicted.”

Salomons, Q.C., and Teece for the Crown.

There was no appearance for the prisoners.

The special case having been read,

Salomons, Q.C., stated the point, and referred to section 470 of the *Criminal Law Amendment Act* (46 Vic. No. 17.) (a)

PER CURIAM. We think the point is unarguable.

Conviction upheld.

(a) 46 Vic. No. 17, s. 470:—Every advised by counsel, make any admissions as to matters of fact, whatever accused person on his trial may, if so

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Criminal law—"Maliciously" inflicting grievous bodily harm—Intent to injure—*Criminal Law Amendment Act* (46 Vic. No. 17), ss. 7 & 24—Second count for common assault.

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On an indictment for maliciously inflicting grievous bodily harm, the intent rather than the result of the act must be considered. The jury should be directed to consider whether the act was done recklessly and wantonly.

The words "with intent to injure," in s. 7 of the *Criminal Law Amendment Act* mean with intent to inflict some substantial injury.

Where a prisoner caused injury to a boy by throwing a bucket of hot water over him, and the Judge directed the jury that it did not matter whether he knew it was hot or not, and that if they considered that grievous bodily harm resulted to the boy from the act, they ought to find him guilty.

Held, a wrong direction. Conviction quashed. *Per Curiam*. The case should have been allowed to go to the jury on the second count for common assault.

SPECIAL case stated by Mr. District Court Judge *Docker*, Chairman of Quarter Sessions :—

"In this case, which was tried at the Darlinghurst sessions, December 8th, the accused was charged with having maliciously inflicted grievous bodily harm upon Peter Joseph Brennan. There was a second count for common assault.

"The evidence material to the point reserved is as follows :—

"Peter Joseph Brennan deposed—I am twelve years old; I live at the Gordon Hotel, Market-street, with my father, who is caterer for the upper part of the hotel. On the 20th November, about ten minutes to six p.m., he sent me down to the kitchen to get a bucket of hot water. I saw the cook there and a friend of his. I got the hot water from the copper in a room adjoining the kitchen; it was boiling. I brought the bucket to the kitchen, and left it on the floor. I sat on the table talking to the cook. Prisoner came in. He is the cellarman at the hotel. He took off his coat and took me by the back of the neck and 'shot' me off the table. I said, 'You'll be shooting me about

the crime charged, or give any consent which might lawfully be given in a civil case—and whether defended by counsel or not, he may make any statement, at the close of the case for the prosecution, and before calling any witness in his defence, without being liable to examination thereupon by counsel for the Crown or by the Court—and may thereafter personally or by his counsel address the jury.

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some of these days till I heave a brick at you.' He took up the bucket, put it on the table, and said, 'If you give me any more of your cheek I'll throw this over you.' He threw it on me; it knocked me on the floor. The water struck me on the back, head, and neck. I was scalded. The cook picked me up and pulled my shirt off. (He then described the injuries he had received, and the treatment.) Prisoner and I were not on good terms; he used to knock me about.

"Cross-examined, he said—The water was steaming when I put it in the bucket. There was a good fire on, and the water was boiling. Prisoner did not say I was in the way. I was at the end of the table. There was no other pail of water there. I don't know whether there were other buckets in the kitchen.

"Charles Alexander, cook at the hotel, deposed—The boy came down about 4.30 p.m. and asked for water. He helped himself at the boiler. He put the water down in the kitchen. There were several buckets there. The boy was speaking to me and several others. He was standing at the table. Prisoner came in about three-quarters of an hour afterwards and told us about the cricket match. He had taken his coat off in his room. He 'shifted' the boy, saying, 'Get out of this; make room for me. They boy ran round the table and said, 'What did you shift me for? I'll put a knife in you some of these days.' Prisoner said, 'If you give me any of your cheek, I'll come and box your ears.' The boy said, 'Some of these fine days I'll give you a brick.' Prisoner said, 'If you give me any of your cheek, I'll put this bucket of water over you.' The boy said something; I turned away. I heard the boy singing out for his father. Prisoner had put the bucket of water over him; he was leaning against a chair. I picked him up, and separated his clothes from his back. Cross-examined, he said—I saw the water thrown; prisoner was 4 or 5 yards from the boy; most of the water went over his head. The water was off the boil in the copper at one p.m. There was a very little fire. The water was not steaming. There were several buckets in the kitchen with soapy water. There were buckets with cold water near. The boy and prisoner were always skylarking.

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" Charles Wilmott, a cook, deposed—I went to the kitchen of the Gordon Hotel about 5.20 or 5.30 p.m. The boy came in about 10 minutes after. He brought a bucket of water from the boiler, and put it down by the block on the kitchen floor. He was skylarking for 15 or 20 minutes afterwards. The prisoner came in. We were all sitting on the table. We asked prisoner about the cricket match. He gave the boy a shove to make room. The boy ran round the table, and said, 'I'll put a knife in you or throw half a brick at you.' Prisoner said, 'I'll box your ears.' The boy said, 'I dare you to do it.' Prisoner said, 'I'll throw the water over you.' There were several buckets there. He took up the bucket of hot water—there was not much steam—and threw it over the boy. He screamed and fell down. Cross-examined, he said—I had been there several times before. I have seen them chaffing, and laughing, and sometimes 'rowing.' There were other buckets of water there.

" Peter J. Brennan, the father of the boy, deposed—At ten minutes to six I sent the boy down for a bucket of warm water. About six o'clock I heard screams. The boy came up—appeared as if he had been boiled—face and neck red—badly scalded. I ran downstairs and spoke to the prisoner. I said, 'Why did you scald the boy?' 'Because he was giving me cheek.' The witness then described the boy's injuries and sufferings, and the treatment.

" In summing up, I referred to the definition of the word, 'malicious,' and in reference to the contention of the learned counsel for the defence that the prisoner did not know the water was scalding, I told the jury that if the prisoner was doing an unlawful act in throwing the water over the boy, it did not matter whether he knew it was hot or not, and that, if they considered that grievous bodily harm resulted to the boy from that act, they ought to find guilty on the first count, and I referred to *Ward's case* (1 L.R. C.C.R. 356).

" The learned counsel for the defence took exception to this direction, and asked me to direct the jury, 'that they could not legally find, or ought not to find, the prisoner guilty on the first count, if they believed that at the time he threw the water he was ignorant of the fact as to whether it was hot or cold.'

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"I declined to give this direction to the jury. The prisoner was convicted on the first count and sentenced to six months' imprisonment with hard labour.

"The question for the consideration of their Honours the Judges of the Supreme Court, is whether my direction to the jury was right."

Healy, for the Crown, referred to *Ward's case* (1), relied on by the learned chairman; and to sections 22 and 24 of the *Criminal Law Amendment Act* (2), as to the "intent;" and to section 7, as to the meaning of the word "malicious" (3). *R. v. Pembliton* (4) and *R. v. Martin* (5) were also cited.

No appearance for the prisoner.

Darley C.J. DARLEY, C.J. In this case the prisoner was indicted under s. 24 of the *Criminal Law Amendment Act*, for having maliciously inflicted grievous bodily harm upon a boy, Peter Joseph Brennan. And there was a second count of common assault.

The question now to be considered turns upon the meaning of the word "maliciously," in that section.

The facts seem to be these: The prisoner and the boy had words; the boy said something to the prisoner, and the prisoner

(1) L.R. 1 C.C.R. 356.

(2) 46 Vic. No. 17, sec 22:—Whoever maliciously by any means wounds, or inflicts grievous bodily harm upon any person, or shoots at any person, or in any manner attempts to discharge any kind of loaded arms at any person, with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent the lawful apprehension or detainer either of himself or any other person, shall be liable to penal servitude for life.

46 Vic. No. 17, s. 24:—Whoever maliciously by any means wounds, or inflicts grievous bodily harm upon any person, shall be liable to penal servitude for five years. Any permanent or serious disfiguring of the person shall be included within the term

grievous bodily harm, for the purposes of this and the said twenty-second section.

(3) 46 Vic. No. 17, s. 7:—Every act done of malice, whether against an individual or any corporate body, or number of individuals, or done without malice, but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise; and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act; and of every indictment and charge where malice is by law an ingredient in the crime.

(4) L.R. 2 C.C.R. 119.

(5) L.R. 8 Q.B.D. 54.

threw a bucket of hot water over him, taking up the bucket nearest to him. But it does not seem that the prisoner knew that the water was scalding, and therefore likely to inflict serious bodily harm on the boy. Under these circumstances the Judge seems to have thought that the law bound him to hold that the act was malicious, and to look to the result flowing from the act done rather than to the intent ; to look to the injury which was inflicted rather than to the mind of the person who inflicted such injury.

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I cannot see that there was anything malicious in what the prisoner did, so as to bring the act within the meaning of the 7th or 24th sections. It may be said that the prisoner took up the bucket recklessly, but at the same time he did not take it up with the intention of inflicting any serious or permanent injury upon the boy. I am of opinion that the words, "intent to injure," in the 7th section, must mean intent to inflict some substantial injury, which, although not necessarily of a permanent character, must be substantial at the time ; and not such injury as would ordinarily be inflicted by the mere throwing of a bucket of water. The question is, did the prisoner take up this bucket of water intending to injure the lad in a substantial manner ? I do not think the evidence warrants that view. I think, looking at the evidence, that it is impossible to say that the prisoner intended anything of the kind. He seems to have taken up the bucket, not knowing whether it was hot or cold, merely for the purpose of inflicting some punishment on the boy for his impertinence.

I think, therefore, that the learned chairman came to an erroneous conclusion, in the view which he took of these two sections, and in the way in which he applied them to the facts before him, and that the conviction cannot be upheld.

It is much to be regretted that the case was not allowed to go to the jury on the second count. If the prisoner had been found guilty of a common assault only, the sentence would have been much lighter than six months' imprisonment. If he did not know that the water was hot, six months was a very severe sentence.

FAUCETT, J. I concur in the result with his Honour the Chief Justice ; but not without considerable doubt. The word

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"malicious" is explained by s. 7 of the *Criminal Law Amendment Act*, according to which a person doing an act recklessly or carelessly is taken to have acted "maliciously." The question is, did this man do this act in a reckless or careless way so as to amount to malice? That is, did he do it with a reckless disregard of the consequence, so as to bring himself within this section?

I agree in thinking that it seems a pity that the prisoner was not found guilty on the second count.

Innes J.

SIR G. INNES, J. I am of opinion that the conviction is bad. When the learned chairman told the jury "that if the prisoner was doing an unlawful act in throwing the water over the boy, it did not matter whether he knew it was hot or not," it seems to me that he uttered that which was directly calculated to mislead the jury. Many assaults are not attended with injurious results, and though unlawful acts are mere hurtless assaults. The learned chairman says that he referred to *Ward's case* (6), and declined to direct the jury "that they could not legally find, or ought not to find, the prisoner guilty on the first count, if they believed that at the time he threw the water he was ignorant of the fact as to whether it was hot or cold." I am of opinion that the learned chairman was not bound to adopt that form of words. The question is whether what he did tell the jury was correct: not whether he did not direct them as the learned counsel for the prisoner asked him. No doubt the Legislature have made a praiseworthy attempt to define "malice" (s. 7), and it is a very correct definition. In *R. v. Pembliton* (7), *Blackburn, J.*, says at p. 221, "Malice may be defined to be 'where any person wilfully does an act injurious to another without lawful excuse.' . . . I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do."

There must be a wilful doing of an act injurious to another (that other being not necessarily the person intended to be injured): not a hurtless or innocuous assault, but one that inflicts, or is intended to inflict, some substantial injury. So, in

(6) L.R. 1 C.C.R. 356.

(7) L.R. 2 C.C.R. 119.

the same case, *Lush*, J., says (at p. 123), "'malicious' certainly must be taken to imply an intention either actual or constructive." In this case the learned chairman might have left the question to the jury to say whether the act had been done "recklessly or wantonly," and if there had been such a finding this verdict would have been perfectly correct. But it was not put in that way. Therefore, though we regret the accident to the boy, and also regret that the prisoner was not convicted on the count for a common assault, the conviction cannot be sustained.

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Conviction quashed.

NOTE.—See *R. v. Latimer* (17 Q.B.D. 359, where *R. v. Pembrton* is discussed).

THE QUEEN v. MATTHEWS.

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Criminal law—Practice—Right of prisoner to be defended at Quarter Sessions by two or more attorneys—Discretion of Judge—13 Vic. No. 7, s. 7—Criminal Law Amendment Act (46 Vic. No. 17), ss. 3 (o) & 342—Substantial wrong—46 Vic. No. 17, s. 423.

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By s. 342 of 46 Vic. No. 17: "Every accused person shall in all Courts be admitted to make full answer and defence by counsel, as the term is by this Act defined." By s. 3 subs. (o): "The term counsel shall include attorneys in all Courts where attorneys now practice, or shall hereafter practice, as counsel." By s. 7 of 13 Vic. No. 7: "In all Courts of Quarter Sessions attorneys shall be allowed to practice and act as counsel, and be heard in all matters before the said Courts in the same manner as barristers now are in the said Courts." This Act was repealed by 46 Vic. No. 17, and the provisions of s. 7 were not re-enacted.

A chairman of Quarter Sessions, on objection being taken, refused to allow two attorneys to jointly conduct the defence of a prisoner.

Held, that although the express words of s. 7 of 13 Vic. No. 7 were not re-enacted, the terms of ss. 342 and s. 3 subs. (o) of 46 Vic. No. 17 placed attorneys on the footing of barristers, as far as the Courts of Quarter Sessions were concerned; and, therefore, two attorneys could (just as two barristers might) jointly defend a prisoner.

Held also, that inasmuch as the prisoner had been deprived of a right conferred upon him by the Act of being defended by two attorneys, he had suffered a "substantial wrong" within the meaning of s. 423 of 46 Vic. No. 17.

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Per curiam. Although every presiding Judge has a discretion to regulate the practice in his own Court, so as to prevent any misconduct or breach of decorum, he cannot for any other reason refuse to hear counsel.

R. v. O'Neill (6 N.S.W. L.R. 43) distinguished and explained.

SPECIAL case stated by Mr. District Court Judge *M'Farland*, chairman of Quarter Sessions :—

"1. The prisoner was recently committed at the Court of Petty Sessions, holden at Bowral, to stand his trial before the Court of Goulburn Quarter Sessions for having indecently assaulted one Lydia Stokes. 2. At that Court of Petty Sessions the prisoner was represented by Mr. C. C. Gale, an attorney resident at Moss Vale; and afterwards Mr. Gale, with the prisoner's sanction, instructed another attorney, Mr. Davidson, of Goulburn, to conduct the defence jointly with himself before the Goulburn Court of Quarter Sessions. 3. Accordingly, on the commencement of the trial at the latter Court Mr. Davidson claimed as a right that the prisoner should be defended by two attorneys, himself and Mr. Gale (then present), and stated that they desired to examine and cross-examine the witnesses between them—that is, that one of them would examine or cross-examine some, and the other examine or cross-examine the remaining witnesses, and that one of them should address the jury.

"4. Mr. Pitcairn, who prosecuted for the Crown, objected on behalf of the bar to the course sought to be taken by Mr. Davidson and Mr. Gale.

"5. I declined to allow two independent or distinct attorneys to appear and conduct the prisoner's defence at the same time. I did so because, for the last twenty years at least, there was no precedent for such proceeding in our Courts of Quarter Sessions; and the having of two or more different persons appearing and acting as attorneys on record for the same prisoner might lead to undesirable complications. Nor was I aware of any enactment that sanctioned the desired departure from established practice. And the effect virtually of permitting two or more distinct attorneys to defend the same prisoner in a Court of Quarter Sessions would be to exclude the bar from practising therein, a result injurious to public interest in my opinion. I considered, also, that the recent decision of the Supreme Court in *Regina v.*

O'Neill (1) established the principle that the chairman of a Court of Quarter Sessions was the judge of the propriety or impropriety of any novel procedure attempted to be introduced therein, either by barrister or attorney. 6. The trial of the prisoner then proceeded; Mr. Davidson conducting the defence alone, and very ably; but the evidence was conclusive, and the prisoner was convicted and sentenced. The question for the decision of the Supreme Court (and which I have been 'required' to reserve) now is—Was there any illegality in my deciding as above stated (in paragraph No. 5)?"

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Field for the prisoner.

Pitcairn for the Crown.

[FAUCETT, J. Is not the case governed by *R. v. O'Neill* (1) ?]

Field. No. This is a question as to the construction of a statute. In *O'Neill's* case it was a mere matter of discretion for the Judge. The effect of section 342 and sec. 3 subs. (o) of the *Criminal Law Amendment Act* is to place counsel and attorneys upon the same footing, and to confer upon them equal rights as to the defence of prisoners.

Pitcairn for the Crown. S. 3 (o) does not give attorneys the privileges or position of barristers. It merely says that one word shall embrace the two branches of the profession. [DARLEY, C.J. This Court regulates the number of counsel it will hear in particular cases, *e.g.*, on demurrers—a rule which differs from the English or Irish practice.] S. 7 of 13 Vic. No. 7 gives attorneys the right of audience at Quarter Sessions. This Act is repealed by the *Criminal Law Amendment Act*. S. 7 of 13 Vic. No. 7 is not re-enacted by 3 (o) or by s. 342. [DARLEY, C.J. It is quite clear that the prisoner has a right to have two or three counsel to defend. Has the Judge a right to say "I will only hear one counsel" ?] I submit that he has. *R. v. O'Neill* (1) shows that the matter is entirely in the Judge's discretion.

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DARLEY, C.J. In this case I regret to say that I am forced to the conclusion that the conviction cannot be upheld. This prisoner, it seemed, engaged at Bowral an attorney, Mr. Gale, and they proceeded to Goulburn, to which place the man was committed for trial, and there, on behalf of the prisoner, Mr. Gale retained a local attorney, Mr. Davidson. The two attorneys appeared in Court, and both claimed to act as counsel on behalf of the prisoner. The Judge, however, declined to allow them to do so, and seems to have thought that this would interfere in some way with the privilege of the bar, and on that ground, and ruling also upon a general principle, bearing upon the power of Judges as laid down in the case of *R. v. O'Neill* (1), he refused to hear the two attorneys. Thereupon Mr. Davidson defended the prisoner alone, and, as the Judge said, very ably; and as the evidence was conclusive against him, the prisoner was convicted. Now, it appears by the Act 13 Vic. No. 7, section 7, that attorneys have exactly the same right to appear for prisoners in Courts of general Quarter Session that counsel have to appear for prisoners in Courts of general gaol delivery. That section of the Act, which is entitled *An Act for the Removal of Defects in the Administration of Criminal Justice*, provides, "That in all Courts of Quarter Sessions in the said colony, all attorneys on the roll of the Supreme Court in the said colony shall be allowed to practice and act as counsel, and be heard in all matters before the said Courts of Quarter Sessions in the same manner as barristers now are in the said Courts." Now, there is no doubt that a prisoner has a right to retain the services of two or three barristers in a Court of Quarter Sessions if he thinks fit, and both or all of these barristers have a right to be heard on his behalf, and to share the difficulties of the case between them. They may divide the work of the examination of the witnesses and one of them may address the Court, acting as senior and junior barristers do under ordinary circumstances. That being the state of law at the time of the passing of the *Criminal Law Amendment Act*, which repealed the Act 13 Vic. No. 7, we have next to consider the provisions of that Act as it relates to this matter. The last paragraph of the interpretation clause, section 3, of the

Criminal Law Amendment Act defines "counsel" in this way—
 "The term counsel shall include attorneys in all Courts, whether attorneys now practising or who shall hereafter practice as counsel." I do not see that there is anything in that definition which takes away from clients the right to be defended as they think proper, or deprives them of the privileges they before possessed of employing two or three attorneys, if they saw fit, to conduct their cases for them in a Court of Quarter Sessions. Therefore in consequence of that section in which where the term "counsel" includes attorneys, I apprehend that attorneys have just as much right to appear—two or three together, if retained on behalf of a client, as counsel have, if two or three counsel are retained on behalf of a client. We have been referred to the case of the *Queen v. O'Neill* (1), to the decision of a very able Judge, a Judge who would have been one of the last to interfere with the rights of counsel or attorneys. In my opinion there is one observation in that judgment which, if read by itself, is likely to mislead; and I do not think it is intended to be read by itself. It is on page 45, where the learned Judge (Sir James *Martin*, C.J.) said, "Well, I am of opinion that the Judge had power to exclude from the Court, or prevent appearing in a case, any person who came before him; and we cannot go into the propriety of the exercise of that power."

I do not think that the late *Chief Justice* himself thought of going to the full extent to which these words would seem to go—that a Judge should have the power, without giving any reason for it, to say to a counsel who was conducting himself properly—"I shall not hear you, Mr. So and So, I desire to hear somebody else"—nor, in my opinion has a Judge any right to say to counsel appearing before him on behalf of a client—"I will only hear the junior counsel or the senior counsel in the case." Unless there be some special or general rule of Court, such as that by which only one counsel is heard on each side in demurrers, the Judge has no power to refuse to hear counsel. I have no doubt that the observations made by Sir James *Martin* referred to the earlier passages on the same page of the report I have cited, where he says this:—

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"There can be no doubt that a Judge of the District Court, as well as Judges of this and all other Courts, have necessarily entrusted to them the power to preserve order and decency in the Courts where they preside. If any person appeared as an advocate before a Judge, whatever his position may be, and used expressions which were insulting to the bench, or mis-conducted himself in any way—for instance, by persisting in doing things which were contrary to the ruling of the Judge—coming into Court in a state of intoxication, or interfering in any way with the administration of justice—the Judge had power to exclude him, and in some cases had power to do more than exclude him." Now, it was cases of this sort that were in his Honour's mind when he spoke of the power of a Judge to exclude any one who came before him. With that limitation there can be no doubt as to the law laid down in that case. Here there is no pretence that these two gentlemen misconducted themselves in any way, as was the case in *In re Pollard* (2), or interfered in any way with the administration of justice. This is simply an arbitrary rule laid down by the Judge who, there being two attorneys in the case, chose to say, "I will only hear one of these two."

Under these circumstances it seems to me that the prisoner has been deprived of the statutory right which he possessed to have his defence conducted by two attorneys. Although by section 423 of the *Criminal Law Amendment Act*, it is provided that "no conviction shall be reversed unless for some substantial wrong, or other miscarriage of justice," I cannot take upon myself to say that where a prisoner has been deprived by the action of the Judge of the services of one of two persons whose services he had an undoubted right to get, that he has not suffered a substantial wrong, or that there has been no miscarriage of justice. For the reasons I have given the conviction must, in my opinion, be quashed.

Faucett J.

FAUCETT, J. The difficulty is not so much one of law as of fact. The question seems to be whether we are to construe this statute in a restricted manner, or fairly, rationally, and liberally. In the first place the law seems to be clear. The right of

attorneys to defend prisoners at Quarter Sessions was given by s. 7 of 13 Vic. No. 7. [His Honour read the section.] Construing that section fairly and, I say again, liberally, it seems to me to place attorneys in the same position that barristers would be as far as those particular Courts are concerned. If an attorney could practice there before, he could practice as a barrister. It is often inconvenient for one single attorney or barrister to attend to a case alone; and there is no reason why two attorneys, just as much as two barristers, should not be allowed to jointly conduct a case; for the Act places attorneys on the footing of barristers in Courts of Quarter Sessions. Such privileges as these were given to attorneys and barristers solely for the benefit of their clients. Section 342 of 46 Vic. No. 17 says that "every accused person shall in all Courts be admitted to make full answer and defence by counsel, as the term is by this Act defined." And sec. 3, the interpretation clause, says that "The term counsel shall include attorneys in all Courts where attorneys now practice or shall hereafter practice as counsel." In other words, it simply puts in another way and in a few words the privileges conferred by s. 7 of the former Act, 13 Vic. No. 7. It seems to me that, if two barristers can be heard in this Court, two attorneys can be heard in Courts of Quarter Session. We sometimes hear two or three, or even four counsel; but, as a rule, the junior counsel do not waste the time of the Court by repeating arguments which the Court has already heard. I confess I had some difficulty at first, but upon consideration, I am quite satisfied that his Honour the *Chief Justice* has put the right construction on the Acts.

In *R. v. O'Neill* (1) the learned District Court Judge said that it was not consistent with decorum that a Crown prosecutor should appear to defend prisoners. Every one must feel that the Judge was influenced by a high principle; and it was held that this Court would not interfere with the discretion of the Court in a matter of that kind. But has a Judge the right to set aside the law and to deprive a prisoner of rights conferred upon him by Act of Parliament? I am sure the late *Chief Justice* never intended to say that the Judge had a right to refuse to hear counsel.

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As to sec. 423, it is difficult to decide whether in this case there has been any substantial wrong or miscarriage of justice. It is the same as if in the striking of a jury some person was struck out contrary to the client's wishes. In such a case, even if the jury had rightly convicted the prisoner, the Court would set aside the whole proceedings on the ground that the prisoner had been deprived of a right. I concur in thinking that the conviction must be quashed.

Innes J.

SIR G. INNES, J. I am of opinion that the conviction was wrong. Looking at the clear and consistent language of sec. 7 of 13 Vic. No. 7 and sec. 342 and s. 3 subs. (o) of 46 Vic. No. 17, I cannot see how there can be any doubt. [His Honour read sec. 7 of 13 Vic. No. 7.] Can it be said that this section does not place attorneys, so far as right of audience in Courts of Quarter Sessions is concerned, exactly on the same footing as barristers? There can be no question that, at the time of the passing of the Act 46 Vic. No. 17, attorneys did practice as barristers in the Courts of Quarter Sessions, and there can be no pretence that the *Criminal Law Amendment Act* was intended in that regard to alter the *status* of attorneys. It seems to me that the learned chairman failed to distinguish between the position of attorneys on the record in civil cases and that of attorneys appearing as advocates for the defence in criminal cases. That seems to be the key to the learned chairman's mistake. I concur with what their Honours have said about *Reg. v. O'Neill* (1). It seems to me that it is only in reference to acts of misconduct or breaches of decorum that the Judge has a right to refuse to hear counsel. It is obvious that such a principle is well founded. The case of *Reg. v. O'Neill* is manifestly distinguishable from this case. It might well be said that in the case of *Reg. v. O'Neill* a grave breach of public decorum was prevented by the action of the learned chairman; for a proceeding of the kind prohibited by him in that case is calculated to shake the public confidence in the administration of justice. It is not seemly that counsel should be one day defending prisoners in one part of the colony, when the next day he may be called upon to prosecute for the Crown in another,

he being all the time a permanent Crown prosecutor. Here it is not suggested that there was the slightest impropriety, misconduct, or breach of decorum. I have no hesitation in saying that I think that to deprive a person of a right of being represented by two advocates amounts to a substantial wrong. It would be rolling back the tide of progress now to say that an accused person should not be heard by counsel in Courts of justice. It would certainly be quite as strong a case as interfering with the right of challenge. In *R. v. Keys* (3) it was held that to deprive a person of a right of challenge was a substantial wrong. In *R. v. Isaacs* (4) it was held that the property in the goods stolen was a substantial allegation which must be proved as laid. In *R. v. Isaacs* there was no doubt about the prisoner's guilt; but because of the substantial defect in the proof, the conviction was quashed. To deprive a person of a right given by statute is a miscarriage of justice.

Conviction quashed.

Attorney for prisoner: *Davidson* (Goulburn).

(3) 6 N.S.W. L.R. 135.

(4) 5 N.S.W. L.R. 369.

THE QUEEN v. STEEL.

Criminal law—False pretences—Statement of existing fact.

The prisoner S. was convicted in an information charging him with having obtained 30*l.* from A. by a false pretence as follows:—"That he, the said S., had 30*l.* to pay for his land to the Crown lands agent at Murrurundi on the following Wednesday, and that if he, the said S., did not pay the said sum, his land would be forfeited."

Held, that the information was bad, as the pretence alleged did not amount to a representation of an existing or past fact.

R. v. Thorland (5 N.S.W. L.R. 412) approved.

SPECIAL case stated by Mr. District Court Judge *Murray*, chairman of Quarter Sessions:—

"This prisoner was tried before me at the Tamworth General Sessions, held yesterday, on an information worded as follows—

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‘That Arthur Charles M’Cumstie Steel, on July 19, 1886, at Blackville, in the colony aforesaid, did falsely pretend to Thomas Arnott that he, the said A. C. M. Steel, had 80*l.* to pay for his land to the Crown lands agent at Murrurundi on the following Wednesday, and that if he, the said A. C. M. Steel, did not pay the said sum, his land would be forfeited; by means of which false pretence the said A. C. M. Steel did, on the day and year aforesaid, obtain from the said Thomas Arnott the said sum with intent to defraud. And that the said A. C. M. Steel, on the day and year and at the place aforesaid, did falsely pretend to Thomas Arnott that he, the said A. C. M. Steel, had thirty pounds (30*l.*) to pay for his land to the Crown lands agent at Murrurundi on the following Wednesday, and that if the said A. C. M. Steel did not pay the said sum his land would be forfeited, by means of which false pretence the said A. C. M. Steel did on the day and year aforesaid obtain from the said Thomas Arnott three certain valuable securities and warrants for the payments of money—to wit, three post-office money orders, each for the payment of and of the value of (10*l.*) ten pounds, the property of the said Thomas Arnott, with intent to defraud.’ There was ample evidence to prove the charge. Mr. Gordon, of counsel for the accused, contended that this information did not charge an indictable offence, as the pretence set out did not amount to the statement of an existing fact. I held that the pretence set out was a statement of an existing fact, as it was equivalent to an allegation that the accused was in the position of a debtor to the Crown on a certain account. I directed the jury in accordance with such holding. The prisoner was convicted, and is now under sentence. The question for the consideration of their Honours the Judges of the Supreme Court is whether or not the information is good.”

Gordon for the prisoner. The false pretence charged here did not amount to an allegation of an existing fact. In *R v. Lee* (1) the facts were almost similar. There the accused obtained the money on the pretence that he had to pay his rent, although he never intended to pay his rent, and it was held that there was

no false pretence of an existing fact. It is not alleged in the information that the prisoner said to the prosecutor that he *then* owed the Crown the money.

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[DARLEY, C.J. It seems to me from the allegation that he had to pay it on the Wednesday; the natural inference would be that the money was not due till the Wednesday.]

R. v. Thorland (2) is a different case. There it was alleged that the prisoner *then* owed the money.

Fitzhardinge, for the Crown, in support of the conviction, cited *R. v. Hughes* (3).

DARLEY, C.J. I am of opinion that this conviction was wrong. *Darley C.J.* It seems to me that the allegation in the information was that the prisoner had falsely pretended there was a sum he had to pay on the following Wednesday, and if I had to draw an inference from that it would be that the money was not due till Wednesday. That would be an allegation of a future, and not of an existing fact. I do not see how this case can be distinguished from the case of *The Queen v. Lee* (1), cited by Mr. Gordon, where the facts were almost similar, the prisoner having obtained money by pretending he had got to pay his rent on a future date, and it was held that there was no false pretence of any existing fact. Cockburn, C.J. (at p. 313), says: "The pretence alleged is that he had got to pay his rent, while in fact he had no intention of paying it, but meant to appropriate the money to his own purposes. That is not a false pretence of an existing fact." That seems exactly like what took place here. Now, *R. v. Thorland* (2) is a very different case. There the allegation was that the prisoner *then* owed the money. As his Honour Sir G. Innes said (at p. 417): "Is it not a false representation as of an existing fact to say that I owe John Smith a certain sum of money, whereas there is no such debt at all? That is a false pretence, and not a mere promise; it is an absolute statement contrary to fact. It is a lie, pure and simple;

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and a lie which represents as an existing fact that which is not an absolute fact." If it had been alleged in the information that the prisoner had said, "I now owe to the Crown the sum of 30*l.*, and if I don't pay it on next Wednesday my land will be forfeited," that would have altered the case. The case of *R. v. Hughes* (3), cited by Mr. *Fitzhardinge*, is a very different case. There the prisoner obtained goods on the faith of a false statement that a bill which he gave for the price of them would be paid on the following day, and he was convicted of obtaining goods under false pretences, though such bill on the face of it was not due till after that day. No doubt the statement that it would be paid was the representation of a future fact. But the information went on to allege that the prisoner said "he had made arrangements that the bill should be paid," and it was proved that he had not made any such arrangements. But in this case there is no representation as to an existing fact, nor anything, as far as I can see, which is equivalent to an allegation that the accused was indebted to the Crown. I cannot gather any such representation from the information, and we have only the information before us in this case. I am of opinion that the conviction was wrong, and therefore should be quashed.

Faucett J.

FAUCETT, J. I am of the same opinion. I must confess that it seems to me very like the statement of an existing fact, and almost justifies the inference which the learned chairman drew that it was equivalent to a statement that he then owed the Government 30*l.* When a man says I have to pay 10*l.* on Monday next, that looks very like a false pretence. But we must follow the decisions. I also agree with what his Honour has said about *R. v. Thorland* (2).

Innes J.

SIR G. INNES, J. I am somewhat glad their Honours have expressed their approval of *R. v. Thorland* (2), in which the late *Chief Justice* differed from the opinion which was entertained by my brother *Windeyer* and myself. As to this case, I entirely concur with their Honours in thinking that this conviction is erroneous. The case *R. v. Lee* (1) seems to be exactly in point. It might be argued that the intention and not the actual

statement should be looked to. But it has been held that the statement must be as of an existing fact. [His Honour read sec. 141 of 46 Vic. No. 17.] The words in *Lee's case* (1) were, "I have got to pay my rent to the squire" on a future day. The Judges did not regard that as equivalent to a representation of an existing fact. The case *R. v. Thorland* (2) is clearly distinguishable, and *R. v. Hughes* (3) is not in point. For these reasons I think the conviction must be quashed.

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Conviction quashed.

Attorney for prisoner: *F. Tribe* (Tamworth).

THE QUEEN v. HARRISON.

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Criminal law—Keeping a brothel—Cumulative offence—Evidence relating to one night only—Purposes of gain—Sentence—Hard labour for females—Criminal Law Amendment Act (46 Vic. No. 17), ss. 398 & 458.

Darley C.J.
Faulstich J.
and
Innes J.

On an indictment for keeping a brothel it may be sufficient in the circumstances of the case to prove what took place on one night only.

It is not necessary to prove that the accused actually received any gain or profit.

Section 398 of the *Criminal Law Amendment Act*, by which light labour is substituted for hard labour in the case of a female, does not apply to those common law misdemeanours for which hard labour may be imposed by section 458. Section 398 only applies to statutory misdemeanours.

SPECIAL case stated by Mr. District Court Judge *Murray*, chairman of Quarter Sessions:—

"The prisoner was tried before me at the Tamworth General Sessions (Jan. 5, 1887), on an information worded as follows:— 'That Mary Ann Harrison, on the 30th day of October, A.D. 1886, and on divers other days and times between that day and the present, at Tamworth, in the colony aforesaid, did keep a common, ill-governed and disorderly house and brothel.' In this case it is unfortunately necessary to set out the evidence.

"John Flaherty, sergeant of police, proved:—I have known the defendant about six years. She has been living in Lower-

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street, Tamworth, in the same house, the whole time. On Oct. 30 she was living there. On Oct. 30 I went about 11 p.m. to her place with constable Drew. I heard a noise in a bedroom that Minnie Prince lived in. I heard voices of two persons. I went to the back up to the window—a window looking into a paddock, a vacant lot. The voices were those of a man and a female. The female was Minnie Prince. I had known her three or four years. She is a prostitute. I heard a third person come in and speak. That person was the accused. She said, ‘Don’t make any noise—put out the light and lock the door.’ The light was put out. I called constable Drew and gave him instructions, and left him at the window. I went into the yard, where the door from the room faces. I looked round and saw the accused sitting in another room; there was a light in it. I went to the door. I saw the accused sitting on a bed. A prostitute, Julia Callaghan, was lying on the floor. She seemed asleep. On a bed was a young woman named Margaret Crowley. I knew her by repute. Her character is very indifferent. I called the accused into the yard. I pointed to the room in which I had heard the voices, and said I wanted to see who was in the room. I then asked where was Minnie Prince. The accused said she had left the day before. The accused afterwards knocked at the door and called ‘Minnie.’ Minnie replied, ‘I’m in bed.’ The accused said, ‘Get up; the sergeant wants to see who’s in the room.’ About five minutes or less I heard constable Drew speaking to a man at the back. I went round and brought a man, William Taylor, into the yard, where the accused was; then Minnie Prince opened the bedroom door. She was undressed. I asked Taylor what money he had when he came to the accused’s place. He said he had 12s. 6d.; that he gave 1s. to the woman who brought him to the place, and gave 11s. 6d. to the woman he was in the room with. I asked Minnie Prince what money she had. She said she gave the accused what money she got. Julia Callaghan has since lived at several places. I have not seen her at accused’s place. Since Oct. 30 I believe only one family has lived at the place. Minnie Prince cleared out. Oct. 30 was Saturday. I summoned the accused. I took steps to get Minnie Prince two or three days

after. I did not find her. I made inquiries, and could not get her. I have not seen her in Tamworth since. I saw her on the 7th Oct. at the accused's place. There have been no complaints since Oct. 30.

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"Henry Drew, constable, proved :—On Oct. 30, a Saturday night, I went with the sergeant to the accused's place. He stationed me at the rear of the house, near a window. I heard two persons talking in the room, a man and a woman; the woman spoke and the man spoke; there was no light in the room then. I heard knocking round on the other side in the court yard. Some one in the room asked, 'Who's there?' The sergeant's voice answered. Next, the window of the room opened, and Minnie Prince looked out of the window; she said something; she went back, and then William Taylor got out of the window. I detained him. Cross-examined :—I heard her say she had given the money to Mrs. Harrison; Mrs. Harrison denied having received it.

"William John Taylor proved :—I live in Tamworth. I gave evidence before. I do not know Mrs. Harrison's residence. I have been in Tamworth since Oct. 15. One night I got drunk and went to the house; the night I saw the police. I was taken up there by some woman. I do not know that I could recognise her if I saw her. I have not seen her since. I do not think I gave her money, except for beer. Could not say what purpose I went for. I remember getting out of the window. There was a woman—a stranger to me—in the room. I was in bed with her. I was waked up and told to get out of the window. I think I saw two women there—perhaps more.

"Julia Callaghan proves too drunk to give evidence, and is committed for 24 hours for contempt.

"Sergeant Flaherty, recalled. —That woman is the Julia Callaghan I saw. She is a prostitute.

"Lizzie Ching gives immaterial evidence.

"Albert Edward Lonsdale, constable, proves :—I have known the accused between seven and eight months. Before October 30 I saw her. I had received some information; and on the 26th I went to her house with a man named Brannigan. Mrs. Harrison said she could not be responsible for what was done in her house.

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“Mr. Gordon, counsel for the accused, contended that there was not sufficient evidence to prove the offence charged. His grounds were: 1st. That there was no evidence that the accused had received any part of the profits of any prostitution carried on in her house. 2nd. That there was no evidence to show that she had permitted her house to be used for the purpose of prostitution. 3rd. That there being only evidence of one single act of prostitution, there was not sufficient proof, assuming that the act was done by her permission, that she was keeping a brothel within the meaning of the information.

“As to the 1st point, I held: 1st. That as the accused had, immediately on Minnie Prince’s asserting that she had given the accused the money she had got, denied the truth of such assertion, there was absolutely no evidence whatever against the accused of her having received any money in this way. This, I held, although strongly pressed by the learned Crown prosecutor with the case of *R. v. Burns & Another* (Knox 183; *Watkins & O’Connor’s Digest*, 67). But I could not take that case as having decided anything contrary to what I take to be the elementary principle of evidence, viz., that a statement made by a third person in the hearing of the accused is (outside of the question of *res gestæ*) only evidence against the accused on the ground that, if he do not deny the truth of it, he may be taken to admit its correctness. But, secondly, I held that the question of gain was immaterial, and that the offence was constituted by the knowingly permitting (whether for gain or any other motive) by the accused the use of her house for the purpose of prostitution.

“As to the second point, I held that the evidence was sufficient to go to the jury.

“As to the third point, I held: 1st. It was sufficient to constitute the offence, that the accused kept her house as a brothel for even a single night. 2nd. Not deciding whether evidence of a single act of prostitution committed in the house with the knowledge and permission of the accused would be sufficient to prove the offence, there was sufficient evidence in this case—taking all the facts deposed together—to prove a general use, with such knowledge and permission, of the house on that night as a brothel.

"I summed up in accordance with such holdings. The prisoner was convicted, and is now under sentence. 1887.

"The question for the consideration of their Honours the Judges of the Supreme Court is: 'Whether I was right in putting the case to the jury as I did?' " REGINA
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The sentence (two years' imprisonment with hard labour) was not mentioned in the special case, but appeared from the indorsement on the indictment.

Gordon for the prisoner. First, the offence of keeping a disorderly house or brothel is a cumulative offence, and cannot be proved by evidence of what was done on one single night. In *Dickinson's Guide to Quarter Sessions* (6th Ed.) p. 217, it is laid down that "where a person is indicted as a common barrator" or a "common scold," or "as keeping a common brothel or gambling house," the offence embraces a succession of acts, by which it is not only proved, but in which it consists. So in *Roscoe's Criminal Evidence* (10th Ed.) p. 93, it is laid down: "In some cases the offence itself consists of a series of transactions as on indictments for barratry, keeping a common bawdy-house, being a common utterer, conspiracy and other cases." Here, instead of proving a series of transactions, the Crown have elected to take Oct. 30 as the starting point, and the evidence shows that after this date the nuisance ceased. Where there is no statutory definition of the act, the Court will look at the information itself to see what is the offence charged. There the offence is alleged to have been committed on Oct. 30th, and "on divers other days and times" after that date. No evidence was given except as to Oct. 30th. A succession of acts ought to have been proved to show that there was an habitual keeping.

[FAUCETT, J. Could not the jury conclude from the fact of finding a number of men and women on the premises on the evening of Oct. 30, that such occurrence was usual, and that there was an habitual keeping?]

Direct evidence of what took place prior to the 30th was ruled inadmissible. That being so, were the jury entitled to

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draw the inference that there was a keeping prior to that date ?

[SIR G. INNES, J., referred to *Shutt v. Lewis* (1), where the mere temporary use of a room for dancing purposes was held not to amount to an habitual keeping.]

[DARLEY, C.J. *P'Anson v. Stuart* (2) shows that the offence is "keeping" the house for the specified purpose.]

[FAUCETT, J. If "keeping" the house means living there, I suppose there is no doubt this woman "kept" the house.]

The point is simply this : What is the evidence necessary to prove the "keeping" of a brothel ?

[DARLEY, C.J. The learned chairman directed the jury that it was sufficient to constitute the offence that the accused kept her house as a brothel for even one single night.]

But the offence being cumulative, *Roscoe* (10th Ed.) p. 823, proof of which was done on one night is insufficient.

[SIR G. INNES, J. It is not necessary to have cumulative evidence.]

In *R. v. Butterworth* (3), Sir A. Stephen had said : " I am of opinion that a 'common gaming house' is one in which games are commonly played with cards, dice, balls, or other implements ordinarily used in gaming, whether such games be in themselves unlawful or not—such games being played, not merely for the recreation of the keeper or his family, and being played 'habitually,' or 'very frequently.' "

[DARLEY, C.J. If dice are found in a house, that may not be sufficient to prove it to be a common gaming house.]

So in 2 *Ohitty's Criminal Law*, p. 232-3 (note u), it is laid down : "The case of barratry is one of those excepted instances

(1) 5 Esp. 128.

(2) 1 T. R. 754.

(3) Wilk. Austr. Mag. 4th Ed. 770.

where it is not necessary to charge any specific act, but the allegation that the defendant is a common barrator will suffice ; the reason of which is, that the offence charged consists in *habitual* conduct, and not in a single misfeasance." So, a general information is sufficient when the offence is keeping a bawdy or disorderly house, the reason being that the offence does not consist in one particular offence, but in a series or succession of acts. In *R. v. Roberts* (4), it was held by Lord *Ellenborough*, that in an indictment for a conspiracy to carry on the business of common cheats, cumulative instances were necessary to prove the offence. The same principle applies to the present case.

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Secondly, there must be evidence of gain or profit accruing to the accused from the use of the house as a brothel. The old form of indictment would have contained the words that the accused kept, &c., "for her own lucre and profit." *Dickinson's Guide to Quarter Sessions* (6th Ed.) p. 425.

[DARLEY, C.J. What is the form of the information in this case ?]

It follows the form prescribed under the *Criminal Law Amendment Act*.

[FAUCETT, J. If a fashionable person kept a house in a fashionable street for these purposes, not for gain, but for amusement, would not that be an indictable nuisance ?]

In *R. v. Erwin* (5), which was argued before Sir J. *Dickinson*, C.J., and *Wise*, J., the prisoner was convicted for keeping brothels, he being the landlord of the houses. The evidence was that *Erwin* had interfered by giving orders to the women about the closing of their houses ; that he had compelled them to buy liquor of him for the use of themselves and their visitors, under a threat of turning them out ; and that he had summarily, and in a most brutal manner, entered a house and ejected one woman because she "did not pay." The Court held that on the evidence the jury were warranted in regarding him as one

(4) 1 Campb. 399.

(5) S.M.H., 22 Dec., 1860.

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who, "by subtle contrivance" (25 Geo. II. c. 36, s. 8), was drawing profit as the keeper of these houses.

Thirdly, the sentence is wrong.

[DARLEY, C.J. How can we entertain this point, as it does not appear in the special case ?]

It is endorsed on the information, which is before the Court (a).

By s. 458 of the *Criminal Law Amendment Act* hard labour may be imposed on conviction for a common law misdemeanour; but by s. 398, whenever imprisonment under this or any other Act is awarded, the Court, wherever sitting, may direct that the offender be imprisoned—or if a male be imprisoned and kept to hard labour, or, in the case of a female, to light labour—in any gaol in New South Wales, &c. Therefore, it is not competent for a Judge to sentence a female prisoner to hard labour.

[SIR G. INNES, J. S. 398 only applies to where the offence is punishable under this or any other Act, and not to common law misdemeanours. In s. 458, which deals only with misdemeanours at common law, the distinction between hard and light labour is not imported. The two sections cannot be read together.]

Fitzhardinge, for the Crown, was not called upon.

Darley C.J.

DARLEY, C.J. Mary Ann Harrison was indicted for "that on the 30th day of October, A.D. 1886, and on divers other days and times between that day and the present, at Tamworth," &c., she "did keep a common, ill-governed, and disorderly house and brothel." The evidence was that the police found several well-known prostitutes there in one room, and a man and a woman in another room together, and that the man got out of the window. Mr. *Gordon* has now argued, and argued, if I may say so, with very great ability, that the conviction was bad, as the

(a) *Gordon* was allowed to go on under exactly similar circumstances, with his argument; the attention of the Court held that they could not the Court not being directed to *E. v. take* judicial cognizance of the sentence. *Price* (6 N.S.W. L.R. 139), in which,

evidence did not show that the house was habitually used as a brothel. I think that the learned Judge was right. I am of opinion that it is enough to prove that on a particular night a house is used as a gaming house or as a brothel. And a Judge is justified in telling the jury that such an offence was proved by evidence that the house was so used on any particular night. No doubt cumulative evidence, that the house has been so used on other occasions, may be given to support the charge, but is not necessary.

Secondly, Mr. Gordon has argued that because it was not proved that the house was used for gain, the conviction cannot stand. The nuisance caused is the bringing a number of disorderly people together in one place for any object. It is not necessary, and it might be impossible, to prove that a person keeping such a house did receive any gain.

Thirdly, as to the sentence. It has been sufficiently pointed out by his Honour Sir G. Innes, the distinction which exists between the two sections. There is nothing therefore in this point.

FAUCETT, J. I am of the same opinion. The real question here is this : whether the offence has been committed, as in the case of any other nuisance it is not necessary to show that the act complained of was done for the purpose of gain. Though no gain is derived, a nuisance may nevertheless be committed. That in this particular case a nuisance was committed, I think there was ample evidence to enable the jury to come to a conclusion, and certainly enough to satisfy anyone of common sense that certain people were there who would not have been likely to have been there except for the purpose mentioned in the information. The facts proved all go to show together "cumulatively" that the house was used *habitually* for that purpose.

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As to the sentence, as pointed out by his Honour Sir G. Innes, the two sections 398 and 458 are perfectly distinct, and there is nothing inconsistent in them.

SIR G. INNES, J. I am of the same opinion. As to the second and third points, I do not think it desirable to say a single word.

Innes J.

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Innes J.

As to the other point, it is argued by Mr. Gordon that there being only one act of prostitution, there was not sufficient evidence to prove the offence. It is set out in the special case that the learned chairman held that "there was sufficient evidence in this case, taking all the facts deposed to together, to prove a general use, with such knowledge and permission, of the house on that night as a brothel." These words are perfectly consistent with the learned chairman's direction to the jury. He did not rule that one single act of prostitution made up the offence of keeping a brothel, but that when you establish the fact that the house was used for the purposes of prostitution for any one night, that is enough. Well, if dissolute persons are drawn together, if only for one night, it would seem to shock common sense to say that this is not an offence.

Conviction upheld.

Attorney for prisoner: *W. Smith* (Tamworth).

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THE QUEEN v. SAMUEL AND MICHAEL LECOUNT.

Darley C.J.
Faucett J.
and
Innes J.

Criminal law—Practice—Mode of appeal—Point of law arising after sentence—Writ of error—Criminal Law Amendment Act (46 Vic. No. 17), ss. 422, 427.

A point of law arising after sentence cannot be reserved under section 422 of 46 Vic. No. 17. The proper course is to proceed by writ of error under section 427.

SPECIAL case stated by Mr. District Court Judge *M'Farland*, Chairman of Quarter Sessions:—

"The prisoners were indicted for having on 7th October, 1886, stolen a sheep, the property of John Cosgrove; and they were convicted of and sentenced for that offence at Cooma Quarter Sessions, held in December of that year. Under section 3 (letter j) of the *Criminal Law Consolidation Act* (passed in April, 1883) the term 'cattle' is made to include 'sheep.' By section 4 of the same Act, 'Whenever a person is made liable to the punishment of penal servitude, the offence for which such

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punishment is awarded is declared to be and shall be dealt with as a felony; and whenever in that Act the term felony is used, the same shall be taken to mean an offence punishable as aforesaid.' By section 73 it is enacted that whosoever steals any cattle shall be liable to penal servitude for ten years. And section 416 declares that no inquest, conviction, or judgment in respect of any felony shall cause any escheat or forfeiture of lands or goods; provided always that on or at any time after the conviction of a person for a felony so committed, the Court in which he was tried, or any Judge thereof, may direct a sum, not exceeding 500*l.*, to be paid out of the property of the offender to any aggrieved person by way of compensation for injury or loss sustained through or by reason of such felony. The jury having convicted the prisoners in the present case, and having regard to circumstances disclosed in the evidence, which showed that Mr. Cosgrove, from whom the sheep was stolen, had been put to serious loss of time, labour, and money by reason of the felony, I sentenced Samuel Lecount to be imprisoned and kept at hard labour in Goulburn gaol for three years, and Michael Lecount to be imprisoned and kept to hard labour in same gaol for two years; and I directed a sum of 50*l.* to be paid out of the property of each prisoner to Mr. Cosgrove, as compensation for the loss sustained by him through such felony. But upon the 'requirement' of the prisoners' advocate, I was obliged to reserve, and now, therefore, submit for the decision of the Supreme Court, this question: 'Whether such direction could be legally given on the indictment, facts, and statutory provisions aforesaid.' "

Pitcairn, for the Crown, took the preliminary objection that this point of law having arisen after sentence, could not be heard by the Court on a special case under section 422 of the *Criminal Law Amendment Act* (46 Vic. No. 17). The proper course would have been to have proceeded by writ of error, as provided for by section 427. In *R. v. Thompson* (1) it was decided that the question of the legality of a sentence could not be reserved under 13 Vic. No. 8. This direction was part of the sentence.

(1) *Knox*, 454.

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Field for the prisoners. The objection would be fatal if the Court were asked to set aside the sentence or quash the conviction. But as it was only the direction as to the payment of compensation by the prisoners to the prosecutor which was appealed against, the Court could deal with the matter on the case before them. It was a "question of law" arising "as to the verdict or judgment given thereon," within the meaning of the last paragraph of section 422.

Per totam Curiam. The matter could only be brought before them on a writ of error, as provided by section 427, which was expressly passed to meet the deficiency of 13 Vic. No. 8.

Field then (with the consent of the Crown) moved, as upon a rule *nisi*, for a writ of error, but

Darley C.J. DARLEY, C.J., pointed out that as the record disclosed nothing on which to found an argument on the point raised, the rule must be discharged. The only course open to the prisoners was to bring the matter before the Executive Council.

Attorney for the prisoners : *Davidson* (Goulburn).

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Feb. 18.
March 12.

Criminal law—Common law misdemeanour—Sentence—Discretion of Judge—Habeas corpus.

Darley C.J.
Faucett J.
and
Innes J.

In the case of common law misdemeanours, where the term of imprisonment is not limited by statute, the sentence is entirely in the discretion of the Judge.

Note to *R. v. Matthews* (2 S.C.R. 227) explained.

Semble, the proper mode of bringing the question of the legality of a sentence before the Court is by writ of *habeas corpus*.

Edmunds, for the prisoner, appeared in support of a rule *nisi* for a writ of *habeas corpus*, granted on the ground that the prisoner, who had been found guilty on a charge of conspiracy to defraud, had been illegally sentenced to seven years'

imprisonment with hard labour, the offence being a common law misdemeanour, for which two years' imprisonment was the extreme punishment, according to the practice of the Court, established by long usage.

Admitting that the term of imprisonment is in the discretion of the Court, there are two questions:—First. Is the discretion of the Court limited? Secondly. By what rule is it limited?

First, as was laid down by *Maule, J.*, in *Freeman v. Tranah* (or *Tranch*) (1), "There is no Court which is entrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times . . . The proceedings of all Courts must take a defined course, and be administered according to a certain uniform system of law which, in the general result, is more satisfactory than if a more arbitrary jurisdiction was given to them." Therefore, although in the case of common law misdemeanours the sentence is in the discretion of the presiding Judge, that discretionary power is not unlimited.

Secondly. It is limited by the usage of the Court. The long-continued usage of the Court becomes the law of the Court; and, unless there is some good reason for departing from it, such usage should be observed. According to that usage, three years is the extreme limit.

[*FAUCETT, J.* The usage in cases of common assault seems to be to limit the term of imprisonment to two years. You cannot succeed unless you show that the usage is uniform.]

In *R. v. White* (2), *Sir J. Martin, C.J.*, says:—"It is uniformly laid down that the punishment for a common law misdemeanour is in the discretion of the Judge; still, that discretion cannot be arbitrarily exercised, for he can impose no higher punishment than the Court has been accustomed to inflict."

[*Salomons, Q.C.*, for the Crown. Further on he says: "It seems that in England the period of imprisonment for misde-

(1) 12 C.B. 406; 21 L.J.C.P. 214.

(2) 13 S.C.B. 339.

1887. meanours, for which no punishment is fixed by statute, is never
 Re more than two years; but a practice has grown up in this colony
 FORBES. of sometimes imposing two years.”]

Though there is no actual limit to the power of the Court, there is a usage by which that power is restrained. So in *Re Price* (3), Sir J. Martin, C.J., seems to have considered it to be settled law that a common law misdemeanour is only punishable by imprisonment for two years. Conspiracy to defraud is an offence similar to larceny, and the Court will not be guided by any authorities in cases of conspiracy to murder, which is a far more serious offence. In *R. v. Matthews* (4), however, in which the prisoner, on his trial for murder, was found guilty of an attempt to commit murder, it was taken for granted that two years’ imprisonment was the maximum punishment for all common law misdemeanours, however serious; and in a note to that case an extract is given from the general view of the *Criminal Law of England*, by J. (now Sir J.) F. Stephen, p. 132, edition of 1863.

[Salomons, Q.C. He does not say so in his more recent writings.]

In his *History of the Criminal Law* (1883), he says (at p. 490) that imprisonment for five years (with pillory, etc.) was the severest sentence for a common law misdemeanour passed since the Revolution.

[DARLEY, C.J. Are you not asking us to do what is usually done by Parliament, namely, to fix the limit of sentence for common law misdemeanours?]

[Salomons, Q.C., referred to *R. v. Castro* (5), on appeal to the House of Lords, where Lord Selborne, L.C., speaking of the punishment for perjury, said: “I think it would be more reasonable to hold that the Legislature intended to leave the Judge such discretion as he had before with regard to any of the penalties, either by common law or by statute, and only to

(3) 6 N.S.W.L.R. 140.

(4) 2 S.C.B. 227.

(5) 6 App. Cas. 233.

enable him to increase the quantum of punishment, within the limits authorised by the statute, if he should think it proper to do so."]

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[DARLEY, C.J. If we were to grant this application, we should be assuming the discretion and taking it away altogether from the Judge.]

I submit that the exercise of the discretion of the Judge at the trial is subject to be reviewed.

[DARLEY, C.J. How can we say that the discretion of the Judge has been wrongly exercised without rehearing the whole case ?]

[FAUCETT, J. Is there not a provision in the *Criminal Law Amendment Act* by which the Court may set aside that portion of a sentence which may be illegal or excessive ?]

By section 423 the Supreme Court (on special case reserved) "may affirm, amend, or reverse the judgment given, or avoid or arrest the same, or may order an entry to be made on the record that the person convicted ought not to have been convicted—or may make such other order as justice requires."

[FAUCETT, J. First of all, you must show that the sentence is excessive, and, secondly, you must show not only that the Judge had a discretion, but also that the Courts had as a matter of practice limited that discretion.]

There is no case in which a common law misdemeanour has been punished by more than two years' imprisonment, as laid down by Sir J. *Martin*, C.J., in *R. v. White* (2) and *Re Price* (3). If it could be shown that in recent times any single sentence had been passed for such an offence in excess of two years, it might be otherwise.

[SIR G. INNES, J. It does seem a very strong thing that it should be in the power of a Judge to sentence a man for a common law misdemeanour to penal servitude for life. To go back to *Magna Charta*, c. xlvi., "No freeman shall be

1887. imprisoned . . . unless by the legal judgment of his peers, or
Re by the law of the land." The *Institutes* say, "As the law
FORBES. directs."]

The discretion of the Judges can only be limited by the practice of the Court.

[FAUCETT, J. I find in my judgment in *Re Price* (3), I am reported to have said: "Although there is no limit to the punishment which may be awarded at common law, yet the Judges have rarely gone beyond two years' imprisonment. That is generally considered the limit to which Judges will go in awarding punishment for a common law misdemeanour." And I used the same expression in *R. v. White* (6), where I added: "At the same time, sentences of imprisonment for any length of time were not illegal." The discretion of a Judge is always limited by the law and practice of the Court, both here and in England.]

Salomons, Q.C. (*Teece* with him), for the Crown. In the first place, *habeas corpus* is not the proper remedy for a case of this kind. I submit that the decision to the contrary in *Re Price* (3) was erroneous. It is laid down in *Forsyth's Cases and Opinions on Constitutional Law* (p. 446) that, "Where a prisoner is in custody under the sentence of a Court of competent jurisdiction, no inquiry will be made by the Court on the return to a writ of *habeas corpus* as to the validity of the sentence or the lawfulness of the custody." Here ample remedy is given by statute. The applicant should have had the point reserved under section 422 of the *Criminal Law Amendment Act*, which, in the concluding paragraph, provides: "And the like proceedings (*i.e.*, by special case) may be taken, so far as they are applicable, where any question of law arises on the arraignment of any person, or as to the verdict or judgment given or to be given thereon." Therefore, any counsel may reserve any point relating to the sentence at the trial. Or, if that is not the proper course, they should have proceeded by writ of error under section 427.

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Secondly, as to the matter itself, a Judge cannot impose hard labour at common law, but he could inflict a fine, and could formerly order the prisoner to be put in the pillory, and he can still sentence him to be imprisoned for any period at discretion, i.e., judicial discretion; e.g., if a Judge sentenced a man to fifty years' imprisonment, the remedy would be to impeach the Judge and procure the prisoner's pardon. Most offences are now dealt with by statute. When the punishment is left to the Judge's discretion, the moderation of the Judges has prevented this point arising. At p. 345 of *R. v. White* (7), his Honour Mr. Justice *Faucett* said: "Whether the Court can amend or not seems to depend very much on whether the sentence is discretionary. How could the Court, without hearing the case, without seeing the witnesses, exercise the discretion left to them? The discretion is not arbitrary, and should be guided by some reason." In *R. v. Castro* (8), *Bramwell*, L.J., said: "By the provisions of *Magna Charta* and the *Bill of Rights*, Judges are restrained from giving inordinate punishments; but, as the common law has drawn a limit to the punishment which may be inflicted for a misdemeanour, even according to the proposition urged before us, no difficulty arises as to a conviction upon an indictment for misdemeanour at common law; the defendant might be sentenced at common law to seven years' imprisonment and a fine upon the first count, and to seven years' imprisonment with or without a fine upon the second count, to commence at the expiration of the sentence upon the first count." And in the same case on appeal to the House of Lords (9), Lord *Selborne*, L.C., gave judgment to the same effect. In *Chitty's Crim. Law* (Ed. of 1816), Vol. III., p. 1144, we find: "The ancient punishment of conspiracy was that called villainous judgment, which was, that the offenders should lose the freedom or franchise of the law, so that they should be disqualified from becoming, in any case, a juryman or a witness; have their houses, lands, and goods seized by the Crown, and, in the language of Lord *Coke*, 'their houses and lands must be estrepped and wasted, their trees rooted up and rased, and their

(7) 13 S.C.R. 345.

(8) 5 Q.B.D. at p. 509.

(9) 6 App. Cas. at p. 238.

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bodies sent to prison, all things retrograde and against order and nature, in destroying all things that have pleased or nourished them': 3 *Inst.* 143. But there is no instance of the infliction of this punishment since the time of Edward III.: 2 *Burr.* 996, 1027. At the present day (*temp. Chitty*) conspiracy is punishable, like any other misdemeanour, at the discretion of the Court in which the offender is convicted, and the penalties are, in many cases, severe."

[SIR G. INNES, J. In *Russell on Crimes* (5th Ed.) p. 197, it is laid down that, "with regard to the punishment of misdemeanours, it may be laid down as a general rule that all those offences, less than felony, which exist at common law, and have not been regulated by any statute, are within the discretion of the Court to punish." *Rex v. Thomas* (10), is cited.]

Edmunds in reply. The Court will review the discretion exercised by a Judge, just as it will review the discretion exercised by the Prothonotary, as in *The North Illawarra Coal Co. v. Commissioner for Railways* (11).

[DARLEY, C.J. We review the discretion of the Primary Judge in Equity appeals. But to review a Judge's discretion involves a rehearing of the case.]

[FAUCETT, J. Can you get over the expressions cited from *Bramwell*, L.J., in *R. v. Castro* (12), as to the imposition of seven years' imprisonment?]

It is only a dictum, and is inconsistent with the opinion of Sir J. F. *Stephen*. This Court has power to review the discretion of any Court in the country, when that discretion has been improperly or arbitrarily exercised.

Cur. adv. vult.

March 12. On Saturday, March 12th, the judgment of the Court (DARLEY, C.J., FAUCETT and SIR G. INNES, JJ.) was delivered by

Innes J. SIR G. INNES, J.:—In this case the sole point for our consideration is whether a sentence of seven years' imprisonment

(10) C.T.H. 278.

(11) 7 N.S.W. L.R. 346.

(12) 5 Q.B.D. at p. 510.

upon a conviction of the offence of conspiring to defraud, a misdemeanour at common law, is legal or illegal. The prisoner has for that offence been sentenced to a term of seven years' imprisonment with hard labour. It is admitted that this offence comes within section 458 of the *Criminal Law Amendment Act* of 1883, and that hard labour may be properly added to a sentence of imprisonment for it. But it is contended that a Judge cannot pass, for such an offence as a misdemeanour at common law, a sentence of imprisonment for a term longer than three years. After hearing arguments on both sides, we deferred pronouncing our judgment, not that we had any doubt that a sentence of seven years' imprisonment was perfectly legal, but that, inasmuch as it would at first sight appear from the case of *R. v. Matthews* (4), and from the note appended to that case at p. 230, wherein is quoted a passage from the treatise of Sir James Stephen, *A General View of the Criminal Law of England*, that an impression had existed in the minds of some jurists that the maximum period of imprisonment for any misdemeanour at common law was two years, we desired to trace the origin of that impression. The case of *Regina v. Matthews* (4) was a case of an attempt to murder, treated as a common law misdemeanour, and the passage in *Stephen's General View of the Criminal Law of England* refers only to that particular class of offences when treated as misdemeanours at common law. Upon examination it would appear that the punishment for most of the offences which would ordinarily come within that particular class of misdemeanours is prescribed by Statute, 9 George IV., chapter 31, section 25, the punishment being imprisonment with or without hard labour for a period not exceeding two years, with power in the Court to impose a fine and to call for recognisances. By the Act 1 Victoria chapter 85, many attempts to murder by certain specified means are made felonies punishable with severer punishments; but apparently some attempts to murder, equally atrocious in point of criminality, had been left still only punishable under the Act 9 George IV. chapter 31. Hence the criticism contained in the passage of Sir James Stephen's work; and hence, as the case of attempt to murder in *Matthews'* case was considered to come under that statute (which statute was in

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force in this colony, having become law in England before the passing of the Act 9 George IV. chapter 83) the maximum punishment for the offence of which Matthews was convicted was two years' imprisonment with hard labour. Obviously, therefore, when this explanation is given, neither the case *Regina v. Matthews* (4) nor the passage in *Stephen* has any relevancy to the case now for decision. With regard to the punishment for misdemeanours, the punishment for which has not been prescribed by statute, the law is correctly laid down by Sir James *Stephen* at page 18 of his *Digest of the Criminal Law* (3rd ed.): "Every person convicted of a misdemeanour for which no special punishment is provided by law, is liable to fine and imprisonment, without hard labour (both or either), and to be put under recognisances to keep the peace and be of good behaviour, at the discretion of the Court." It is unnecessary to heap up authorities in support of this statement of the law, but a passage occurs in the judgment of *Bramwell*, L.J., in *The Queen v. Castro* (8), at page 509, which puts the matter so clearly that it may well be introduced here:—"By the provisions of *Magna Charta* and the *Bill of Rights*, Judges are restrained from giving inordinate punishments; but as the common law has not drawn a limit to the punishment which may be inflicted for a misdemeanour, even according to the proposition urged before us, no difficulty arises as to a conviction upon an indictment for misdemeanour at common law: the defendant might be sentenced at common law to seven years' imprisonment and a fine upon the first count, and a seven years' imprisonment, with or without a fine, upon the second count, to commence at the expiration of the sentence upon the first count." This passage is not to be regarded as a mere *obiter dictum*, as it is made use of by Lord Justice *Bramwell* as a cogent reason in refutation of the argument which had been in that case urged upon the Court. The offence of conspiracy to defraud is a misdemeanour for which no special punishment is provided by law, except that by statute hard labour may be added as an incident of the term of imprisonment; no limit is assigned to the term of imprisonment, the limit being left entirely in the discretion of the Judge. In the practical exercise of that discretion there are certain rules

which are respected, particularly the provision in the *Bill of Rights* "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The principles regulating the apportionment of punishment, so far as that apportionment rests in the discretion of Judges, are common to felonies and misdemeanours. Punishment should be "not only proportioned to the offence in degree, but adapted to it in kind: it should be measured not only by the abstract enormity of the offence, but by the age, sex and circumstances of the offender;" and, while justice should always be tempered with mercy, the exemplary and deterrent effect of punishment should be held steadily in view. It is impossible to say that in this case, looking at all its circumstances as disclosed in the case reserved, any of those rules or principles has been disregarded; although, even if it had been otherwise, we do not see that this Court could take upon itself to pronounce the sentence illegal. The conviction must be sustained, and the rule *nisi* be discharged.

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Rule discharged.

Attorney for prisoner: *W. J. Hill.*

THE QUEEN v. TRICKETT AND JORDAN.

March 4.

Criminal law—Confession, when admissible against accomplice—Evidence—Cross-examination—Contradiction.

Darley C.J.
Faucett J.
and
Innes J.

When a witness is asked immaterial questions in cross-examination, his answers must be received, and evidence cannot be given to contradict him.

A Judge has a perfect right to disallow questions put for the purpose of disparaging or torturing a witness, when they cannot possibly affect his credibility.

A statement made by J. in the presence of T., implicating both J. and T., and not denied by the latter, although of doubtful value as against T., is evidence to go to the jury, who may give weight to each statement according to the circumstances of the case.

SPECIAL case stated by Mr. District Court Judge *Forbes*, chairman of Quarter Sessions:—

The following case was tried before me at the Quarter Sessions held at Darlinghurst on 7th February, 1887:—Barton Trickett

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and Alfred Jordan were charged that on the 15th January, 1887, they did, at Sydney, steal one hundred yards of lace, the property of Thomas Joseph Lloyd, and a second count charged Jordan with receiving the same, knowing it to have been previously stolen. They pleaded not guilty, and Trickett was defended by Mr. Fawl; Jordan by Mr. Thomas.

The following evidence was given:—Constable O'Sullivan arrested prisoners on the 18th January at 97 Market-street, in a house kept by a Mr. Marsh. They were together; I asked them to come upstairs with me, which they did, and I showed them a box, which contained a quantity of lace, under a side-table. I asked prisoners who it belonged to; they both said they knew nothing about it; Jordan then said to Trickett, "It is no good, the box is mine." Trickett said nothing. I then arrested them both, and charged them with the offence mentioned in the information; neither of them made any reply. Afterwards, when both prisoners were together, I heard Jordan say: "Trickett brought the box on Monday night, and I was to get so much for selling it." Trickett said nothing when he heard that. Cross-examined by Mr. Thomas:—I did not charge them until they were upstairs, and Jordan made the statement. I then arrested them. Cross-examined by Mr. Fawl:—I had not arrested the prisoners when I requested them to come upstairs.

Thomas Lloyd: I am a draper and milliner; I know the prisoner Trickett; he was in my employ for three months as a salesman. (Witness examined the lace in the box which the constable had produced). The lace in this box is mine, and the box also. The box was kept under the counter, among empty boxes, and the lace was in similar boxes on the shop shelves. I did not sell that lace to any one. It was in the shop on the 1st January, 1887, and no one had permission to sell it out of the shop after that date. It is worth £50. Up to the first January it was prisoner Trickett's duty to move this lace, but not after. I saw this lace in the shop window about four or five days after 1st January, and I said to him: "How is it you have left those laces in the window? Take them out at once, as there is too much dust about." I went away and returned in about an hour,

and they were out of the window then. I have seen Jordan once or twice in my shop, but I cannot say the dates. Mr. Thomas does not cross-examine. Cross-examined by Mr. Fawl: We took stock after the 1st January. The day on which prisoners were arrested the goods would have been put in stock had they been in the shop, but they were not there. We were taking that kind of stock on the day prisoners were arrested. I was waiting until Trickett came back to the shop to ask him about it. The police brought in the box with the lace in it, and I claimed it as mine. I was not away from my shop. I was not neglecting my business. I was not away for three months. I have not been in liquor in the presence of my employees. There were about seventeen persons in my employ, including milliners, workers, and others, at that time.

Mr. Marsh, hotel-keeper at 97 Market-street: I know both prisoners. Jordan was in the habit of frequenting my place, and sometimes Trickett has been there. I saw Trickett and Jordan there together on the 15th of January last. The constable came up and asked me in the presence of the prisoners was there a parcel in the house. I said: "Not as I know." They said: "We are detectives." I then said: "Come in and see for yourselves." They came in and took a box (like the one produced) from under a side-table upstairs. That box was not there in the morning. They asked prisoners where the box came from. O'Sullivan said: "I saw you bring it in. Where did you get it?" Jordan replied: "I got it down the street." Johnson was the name of the other constable. He asked Trickett where he worked, and Trickett said at Lloyd's. They then arrested prisoners, and took them away. Cross-examined by Mr. Thomas: "I think Jordan said he was selling it on commission." This was the case for the Crown.

Defence. Mr. Fawl calls Mr. Foley: I was foreman for Lloyd for about five weeks, and left about the 8th or 9th of December; Trickett was also there. The business was not carried as I should have liked to have seen it; it was not business-like. Mr. Lloyd did not pay the attention he ought to have done. The business was not going on very well with him. He said he was thinking of giving it up, as the house was not profitable. I was dismissed by Mr. Lloyd.

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Miss Brown : I am in Lloyd's employ. The business has not to my knowledge been conducted in a loose or improper manner. I have noticed that Mr. Lloyd has occasionally been the worse for liquor.

Mr. Allmay: In my opinion the business was carefully managed. Cross-examined by the Crown prosecutor: Was in Lloyd's employ about two months. I see the lace produced; it has Lloyd's private mark on it, which proves that it was at one time in the shop. Similar goods to those were in stock in January last, and we have not commenced to sell yet, so that if the goods produced were in the shop on the 1st January, they could not have been sold out of the shop.

Mr. Thomas calls Mr. —: I have known Jordan for three years; found him honest and trustworthy. I have known him as a commission agent. James Rowley: During three years I have known Jordan, I thought he was of good character. James Ridley gives Jordan a good character; known him for two years.

Mr. Fawl, on behalf of Trickett, proposed to call some witness to prove that Mr. Lloyd's cheques had been dishonoured, and to prove that Mr. Lloyd was sometimes intoxicated, and I refused to receive his evidence. I told the jury, when summing up, among other things, that when two or more prisoners were tried together, the confession or admission of one was no evidence against the other as a confession or admission, but that the statements made by Jordan in the presence and hearing of Trickett, and Trickett not having made any reply, was one of the surrounding circumstances of the case, and, as such, in that way, they might consider it as a charge made and not replied to, although Trickett was not bound to reply unless he wished to do so.

Verdict: Trickett guilty of stealing; Jordan guilty of receiving, with a strong recommendation to mercy on account of previous good character.

I sentenced each prisoner to nine months' hard labour in Darlinghurst gaol. Mr. Fawl requested me to reserve the following points:—1. That, as Mr. Lloyd had in cross-examination stated that he was not away or neglecting his business, or in liquor in the presence of his employees, I should

have permitted Mr. Fawl to call witnesses to contradict this.

2. That Mr. Lloyd, in cross-examination refused to answer the question whether any of his cheques had been dishonoured. I should have compelled him to answer the question; and further, that I should have allowed witnesses to be called for the defence to prove that some of Mr. Lloyd's cheques had been dishonoured.

3. That there was not sufficient evidence in the case to warrant the jury in finding a verdict of guilty of stealing.

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Salomons, Q.C. (Murray with him), for the prisoner Trickett.
As to the first point, the Judge should have allowed evidence to contradict Lloyd as to his being at his business, &c.

[DARLEY, C.J. How could that affect the stealing? Was not that proved by the finding, in the prisoners' possession, goods recently stolen?]

At any rate, he should have been compelled to answer the questions put to him in cross-examination.

In *R. v. Orton or Castro*, the question was, whether the prisoner committed perjury in swearing that he was R. T. A witness against the prisoner deposed that he made tattoo marks on the arm of R. T., which at the time of the trial were not, and had never been, on the arm of the prisoner. It was held that the witness might be asked and compelled to answer the question whether he ever committed adultery with the wife of one of his friends. This case is given as an illustration to Art. 129 of *Steph. Dig. of Ev.* That article (129) lays down:—"When a witness is cross-examined, he may be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in Art. 120 (witness not to be compelled to criminate himself)." So in *Roscoe's Cr. Ev.* (10th Ed.) p. 144:—"A witness may be questioned on cross-examination, not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his

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1887. character for credibility, his memory, his means of knowledge or his accuracy.”
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[FAUCETT, J. If the prisoners' advocate had asked the prosecutor if he was ever away for three months at a time, and whether any such absence took place during the period covered by this transaction, it might have been otherwise.]

As to the other point, the statement by Jordan, although made in Trickett's presence, was no evidence against Trickett. *R. v. Turner* (1) cited in *Roscoe's Cr. Ev.* (10th Ed.) p. 53.

Clark Irving, for the Crown, was not called upon.

DARLEY, C.J. I have not the slightest doubt that this conviction should be upheld. As to the first point:—In my opinion the learned Judge was right in not allowing the question to be asked. A counsel who asks questions such as were asked of the prosecutor in cross-examination, is bound by the witness's answer. Such questions having been asked, and having been answered, I know of no principle on which evidence could be called in contradiction.

As to the second point, I think the learned Judge was also right. Questions of this sort cannot possibly go to the credit of a witness. Even if he had had cheques dishonoured, it is difficult to see how that could affect his credit as a witness of truth in an inquiry of this kind. I think the learned chairman was right in not compelling the witness to answer a question which could only be put for the purpose of torturing the witness, and if it had been answered, the chairman would have been right in refusing to allow evidence to be called to contradict the witness's answer.

As to the third point, I think the best way to have raised the point would have been by taking exception to the Judge's ruling. On that point, however, I think the Judge was entitled to hold that on the evidence before him there was a case to go to the jury. It is laid down in *Archbold's Cr. Pl. and*

(1) Mbo. C.C. 347.

Ex. (19th Ed.) p. 258, "It is also necessary to observe that a man's confession is only evidence against himself, and not against his accomplices; unless, indeed, the confession was made in the presence of the accomplice, and when the prisoners were not before a magistrate, in which case it would be evidence, although of doubtful value, and that even although he made no observation upon it." Here the Judge would have been quite right to have told the jury that the statements of Jordan were of doubtful value as against Trickett. But, bearing in mind all the circumstances of the case, the jury were entitled to give what weight they thought fit to those statements, and to convict the prisoners upon them. According to the constable's evidence, Trickett said, "I know nothing about it." Jordan then said, "It's no good; the box is mine." To that Trickett said nothing. I think the jury were entitled to have the evidence before them, and to give weight to it. I am of opinion that the conviction cannot be disturbed.

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FAUCETT, J. I am of the same opinion. Lloyd having answered a number of questions, which were utterly immaterial, counsel asking such questions is bound by the answers he receives, and cannot call evidence to contradict them. I confess I cannot see how the fact that a person has had his cheques dishonoured could possibly go to shake his credit. It is not a question as to moral character, as was the question in *Orton's case*. There the questions were allowed on the ground that a man who could be guilty of adultery with a friend's wife would not be likely to tell the truth. But the fact that a man has had his cheques dishonoured cannot go to show any such moral obliquity as would render him an unreliable witness. Such a question could only go to show his commercial position.

Faucett J.

Secondly, I will add nothing to what his Honour has said as to the next point, as I cannot see the faintest possibility of doubt on the point.

Thirdly, I think the evidence was amply sufficient to justify this conviction. The evidence shows clearly that the lace was stolen, and that it was found in the possession of the prisoner Jordan. The only thing remaining is to connect the prisoner

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Trickett with the transaction. Now Trickett was proved to be in the employ of Lloyd at the time the lace was missed, and to have had to deal with the lace in the ordinary course of his employment. There was, therefore, a kind of recent possession in Trickett, which might well go to the jury. Trickett was in a position to contradict the statement of Jordan, and did not do so; but, at the same time, I am not prepared to say that that statement by itself would be sufficient evidence against Trickett.

Innes J.

SIR G. INNES, J. I must confess, with every respect for the ability of the eminent counsel who argued this case, that I have been puzzled to know how these points could be seriously maintained. That in our opinion there is nothing in them is shown by the Court not calling on the counsel for the Crown. It has been decided by this Court in *Trotter v. Bennett* (2) that counsel asking a question irrelevant to the issue is bound by the answer of the witness, and cannot call evidence to contradict him. As to the first point, the objection is that the prisoners' advocate was not allowed to contradict the witness Lloyd as to his being at his business at the time when the lace was supposed to have been stolen. How can it be said that his having had cheques dishonoured could affect his credibility? It has been suggested that in consequence of his financial difficulties he took to drink. But that is manifestly too remote a cause for us to consider.

As to the third point, I asked Mr. *Salomons* if he seriously intended to argue it, and he said he would convince the Court of its force. What are the facts? Lloyd proves that the property was his; that the prisoner Trickett was in his employ for some months, and during some months in control of this very property. Some days before it disappeared he saw the lace in the shop window, and reprimanded Trickett, and told him to take it out of the window. Some days after this it is stolen, and found in a box in the house where the two prisoners are staying. The prisoners were both present, and said they knew nothing about it. Jordan then said to the detective: "It's no good; the box is mine."

Trickett said nothing. Jordan again said: "Trickett brought the box on Monday night, and I was to get so much for selling it." Trickett said nothing whatever when he heard that. Will anyone say that that is not abundant evidence to convict Trickett of stealing and Jordan of feloniously receiving the property?

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Conviction upheld.

Attorney for prisoner Trickett: *Fawl.*

**BOMBALA FARMERS' FLOUR MILLS CO. v. VICTORIA
INSURANCE CO.**

Feb. 24.
March 1.

Costs—Taxation—Expenses of country attorney coming to Sydney to conduct cause—Expenses of country attorney as witness—Discretion of Prothonotary—Unnecessary affidavits—No review as to trifling amounts—Practice—Additional affidavits.

Darley C.J.
Faucett J.
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In an action to recover 1455l. on a policy of fire insurance, which, when part heard, was referred by consent to arbitrators, who awarded the plaintiffs 1072l., the Prothonotary on taxation of costs taxed off altogether an item of 173l., the expenses of the plaintiffs' country attorney. These expenses were claimed in the affidavit of increase, on the grounds that the attorney's attendance in Sydney was necessary for the proper management of the cause at the hearing, and also that he was a necessary and material witness.

Held, that both questions were entirely in the discretion of the Prothonotary, and that the Court would not interfere, as it was not shown that the Prothonotary was clearly wrong in the exercise of his discretion.

Held also, as to another item of 2l. 17s., which was disallowed, that the amount was too small for the Court to interfere.

Per DARLEY, C.J. As to the item of 2l. 17s., that the Prothonotary was right in refusing to allow the costs of affidavits, &c., incurred through the plaintiffs' unnecessary opposition to a summons for discovery.

Held, also, that fresh affidavits could not be read, as the Court could only decide on the materials that were before the Prothonotary.

SUMMONS to review taxation referred from Chambers.

The action was brought to recover 1455l. on a policy of fire insurance. The defendants, by their pleas, denied the making of the policy, the loss by fire, the plaintiffs' property in the goods destroyed, the delivery of an account of such loss within the time mentioned under the conditions indorsed on the policy;

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and pleaded further that the plaintiffs delivered a false and fraudulent statement of such loss.

Before pleading, the defendants took out a summons for discovery, and filed two affidavits, copies of which were sent to the plaintiffs' attorney by his Sydney agent, to whom an affidavit in opposition, by the secretary of the plaintiff company, was forwarded. An order for discovery was made in Chambers, the Judge ordering that the costs should be costs in the cause. The ground of opposition to this application for discovery was that before action the defendants had sent to Bombala a Mr. Crispin, as their representative and assessor, for the purpose of ascertaining the loss occasioned to the plaintiffs under the policy, and that Mr. Crispin had minutely inspected and examined the plaintiffs' books of accounts, &c., and that he expressed satisfaction with the claim made.

The case came on for hearing before *Windeyer, J.*, and a jury of four on September 22nd and 23rd, and on the latter day, before the plaintiffs' case was concluded, it was agreed that a verdict should be entered for the plaintiffs, and that the amount of loss should be referred to the arbitration of two accountants and an umpire.

The sum found upon such arbitration, which lasted several days, to be due to the plaintiffs was 1072*l.*, and a verdict was accordingly entered for that amount.

On taxation of the plaintiffs' bill of costs, the same was allowed by the Prothonotary at 520*l.* 14*s.* 9*d.*; but he disallowed the costs of forwarding copies of the affidavits filed by the defendants in support of the summons for discovery, and also the costs of the affidavit of the secretary of the plaintiff company in opposition thereto. These items amounted to 2*l.* 17*s.* 2*d.*

Under the head of witnesses' expenses there was an item of 173*l.* 10*s.* for the expenses of Mr. Myers, the country attorney of the plaintiffs.

The affidavit of increase set out (amongst other things) that Mr. Myers' presence was necessary both as a witness and as attorney; that he came to Sydney from Bombala for the purpose of giving evidence and looking after the case; that as attorney for the plaintiff he was consulted and actively engaged in the

matters involved in the action and the correspondence relating thereto: that he assisted very largely in the establishment of the plaintiff company, and from its establishment to the date of the action not only acted as attorney thereof, but as an active adviser in its general management; that it would be dangerous for the plaintiffs to go to trial without his personal, direct, and immediate management and advice; that if the trial of the case had proceeded to verdict occasions would have arisen when he alone could have given the necessary evidence; and that he was necessarily absent from Bombala (312 miles from Sydney) for 32 days. This was supported by an affidavit of Mr. Jonas, the managing director of the plaintiff company, who stated that it was the unanimous wish of the directors that Mr. Myers should go to Sydney and personally attend the case at the hearing.

The Prothonotary, however, disallowed the whole sum, allowing the sum of 7*l.* 7*s.* for the attendance at the hearing of the Sydney agent of the plaintiffs' attorney.

The plaintiffs thereupon took out a summons for a review of the taxation as to the disallowance of the above items.

Rogers and *Cohen* for the plaintiffs, in support of a summons to review the taxation as to the disallowance of the above items, proposed to read affidavits filed since the matter had been referred from Chambers to the Court.

C. B. Stephen, for the defendants, objected.

PER CURIAM. We must decide on the materials that were before the Prothonotary.

Rogers. Every possible plea was set up, including one alleging a fraudulent overcharge. After having sent up an agent, Mr. Crispin, to inspect the plaintiffs' books in respect of the overcharge, the defendants demanded that the books should be sent down to Sydney for inspection. Mr. Myers wrote to say that the plaintiffs could not send the books, but that anyone could go to Bombala and inspect them there. The defendants then took out a summons for discovery, and when the Judge in Chambers granted the application for discovery he made the costs costs

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in the cause. Therefore the Prothonotary was wrong in refusing to allow the costs of copies of the defendants' affidavits and of the plaintiffs' affidavit in opposition. As to Mr. Myers' expenses, he was in attendance as a witness, but was not examined. After one or two witnesses had been examined in support of the plaintiffs' case, the defendants saw that they had no chance of resisting the plaintiffs' claim, and consented to a verdict being entered for the plaintiffs, and to a reference to arbitration to determine the amount due to them. Considering the circumstances of this case, the Prothonotary was clearly wrong in refusing to allow Mr. Myers' expenses. The Court will always interfere where the Prothonotary has come to a wrong conclusion: *Ohit. Arch.* (12th Ed.) 521. In *Madison v. Bacon* (1), where the Master had refused, on taxation of costs for the defendant, to allow the expense of the attendance at the trial in London of the attorney who had conducted the cause in the country, on the ground that the defendant had called no witnesses, the Court ordered a review of the taxation, on an affidavit showing that the circumstances of the case justified the attendance of the country attorney. *Chapman v. Rodway* (2) is very like the present case, and a strong authority in our favour.

[DARLEY, C.J. In that case it appears to have been taken for granted that both the country and London attorneys were necessary and material witnesses, and they were examined at the trial.]

Mr. Myers was a necessary witness as to what took place at the interview between Mr. Crispin, who was sent up by the defendants to inspect the plaintiffs' book. In *The North Illawarra Coal Co. v. The Commissioner for Railways* (3), the Court interfered with the discretion of the Prothonotary in disallowing counsel's fees, acting on the principle laid down in *Grindall v. Godman* (4).

[DARLEY, C.J., referred to *Power v. McKellar* (5), in which *Windeyer, J.*, refused to interfere with the Prothonotary's decision

(1) 5 Bing. N.C. 246.

(2) 27 L.J. Ex. 7.

(3) 7 N.S.W. L.R. 346.

(4) 5 Dowl. 378.

(5) Tarleton's Term Rep. 183.

in disallowing the costs of a country attorney's attendance at a trial in Sydney.]

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O. B. Stephen, for the defendants. Mr. Justice *Windeyer* has constantly refused in Chambers to interfere with the discretion of the Prothonotary. If that were not the practice, appeals from the Prothonotary's discretion would be innumerable. Here the Prothonotary has not come to a wrong conclusion; therefore the Court will not interfere: *Rennie v. Mills* (6); *Doe v. Webber* (7). As to *Chapman v. Rodway* (2), the Taxing Master was in error in supposing that as a matter of principle a country attorney's expenses were never allowed where there was an agent to look after the case. In *Parsloe v. Foy* (8), *Taunton, J.*, said that this question of allowing the costs of a country attorney was a matter peculiarly fitted for the discretion of the Master. That opinion was also expressed in *Archer v. Marsh* (9), a case in which the Court refused to interfere where the Master had allowed the country attorney's expenses.

[*INNES, J.* In that case it is not suggested that the attorney was necessary as a witness.]

As to whether he was a necessary and material witness or not, the Prothonotary had all the affidavits before him, and decided that he was not.

[*INNES, J.* Under which plea would Myers' evidence have been requisite?]

[*Rogers.* To meet the charge of fraudulent overcharge. The trial lasted two days before it was referred, and the arbitration lasted a week.]

All the directors were here as witnesses, and some of them were present at all the conversations that took place with Mr. Crispin. Besides, the affidavits show that the directors wanted Mr. Myers to attend as attorney.

(6) 5 Bing. N.C. 249; 8 L.J.C.P. 148. (8) 2 Dowl. 181.
(7) 4 N. & M. 381; 2 A. & E. 448. (9) 7 Dowl. 541.

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As to the second item, it is too small. In *Newton v. Boodle* (10), the Court refused to entertain a question of 40s. Here the amount is only 2*l.* 17*s.* If not, it was in the Prothonotary's discretion to disallow the cost of sending copies of our affidavits to the country. The application was for discovery, not for inspection.

[DARLEY, C.J. Those are distinct applications. The first is for an affidavit showing what documents a party has in his possession : the second to inspect the documents so disclosed.]

The only answer to the first is that they have no documents to disclose. It is in answer to the second that the question of their materiality arises.

Rogers, in reply. The Prothonotary has not merely cut down the item of 17*l.* 10*s.*, but he has struck it out altogether. Myers would have been a material witness if the trial had continued, although, owing to the defence being abandoned, he was not required at the arbitration. Although the general rule may be that the expenses of a country attorney are not allowed, the cases show that there may be an exception to the rule where the attorney's presence is required both as attorney and witness.

Darley C.J. DARLEY, C.J. I am of opinion that the Prothonotary's discretion ought not to be reviewed by us in this case. Two points have been taken by Mr. *Rogers*, as to the disallowance by the Prothonotary of Mr. Myers' expenses. First, that these items ought to have been allowed for this gentleman's expenses as an attorney, and secondly, if not allowed on this ground, they should have been allowed to him as a witness. First: I do not know that the Court has laid down a general rule that in no case will the costs of a country attorney as well as of a town attorney be allowed on taxation. In *Galloway v. Keyworth* (11), the matter is put on a very clear footing. Maule, J. (at p. 231 of 15 C.B.), says:—"The Court does not sit strictly as a Court of Appeal from the decision of the Master. Costs of

increase are allowed at the discretion of the Court; but that discretion is, for convenience sake, exercised through the Master. The Court has still an original jurisdiction. You may now urge that the expense of the witness's attendance ought to have been allowed on the ground that he was a material witness." This is just as applicable to the case of a country attorney coming to Sydney. In this case I do not think the affidavits show that the Prothonotary was wrong.

As to the second point, that this item ought to have been allowed for the attorney's expenses as a witness, as it was laid down by *Maule, J.*, it is quite open for the Court to overrule the Prothonotary, if the Court think that the witness, whose expenses have been disallowed, is a material witness. But I do not think that it does appear that he would have been a material witness. As a matter of fact all the directors of the company were in attendance as witnesses; it was alleged, however, that Mr. Myers, from the part he had taken in forming the company, and being its general adviser, and particularly from his having been its mouth-piece at a conversation between some of the directors and Mr. Crispin, was a necessary and material witness. The question is whether the Prothonotary ought to have allowed his expenses, together with those of the other witnesses. The law is thus stated in *Ohitty's Archb.* (12th Ed.) p. 514, where cases are cited: "The Masters will allow the expenses of all necessary witnesses . . . although they were not called at the trial . . . The Master is in general the sole judge of the number of witnesses to be allowed in support of the same matter." We have no facts before us to cause us to think that the Prothonotary was wrong in coming to the conclusion that he was not a material witness.

As to the item of 2*l.* 17*s.*, I think the Prothonotary was right in refusing to allow it. There was no necessity for the plaintiffs to oppose the application for discovery. They had simply to file an affidavit setting out what documents, &c., they had in their possession, or that they had no such documents. No affidavit in opposition was necessary. If they considered that any of the documents disclosed by such affidavit were privileged from inspection, the proper time to file affidavits in opposition would have been when the summons for inspection was taken out. But

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in this case the documents in question were an essential part of the plaintiffs' case. Besides, the item is too small to justify the interference of the Court.

FAUCETT, J. As to the 2l. 17s., we ought not lightly to send back items for review where the amount is so small.

With respect to the other matter, it is one of great importance. I think it rests with the Prothonotary to say whether a country attorney shall have the costs of coming up to Sydney, when there is a town attorney to act in the case. It seems a strange thing that there should be two attorneys at the same time. There may be cases where the country attorney's presence in town would be of great advantage to his client, and where the town attorney could not supply his place. At the same time if a party desires to have two attorneys, it seems a hard thing that the other side should, in the event of their losing, have to pay for the luxury enjoyed by their opponents of having two attorneys. I should have been better pleased if the Prothonotary had decided the other way; but he had all the documents before him, and had better opportunities of judging of the circumstances of the case than we have. At the same time, while expressing this opinion, I do not dissent from the judgment of his Honour the *Chief Justice*.

As to the other point, the question really is, was he necessary as a witness? The manager, the secretary, and all the directors of the plaintiff company were brought here as witnesses. It was a question for the Prothonotary to determine how many witnesses were required to prove any one point. If I had been taxing officer, I should probably have taken these things into consideration, and should possibly have decided differently. Still I cannot say that the affidavits are strong enough to induce me to say that the Prothonotary was wrong.

Innes J.

SIR G. INNES, J. As to the smaller item, I concur in thinking that the matter is too small for the Court to interfere.

As to the other point, I also agree that this is not a case in which we should interfere with the discretion of the Prothonotary. The Prothonotary has had great experience in these matters, and unless he has refused on some wrong principle to

exercise his discretion, or has exercised his discretion in a manner that is clearly wrong, the Court will not interfere. In the one case we should send it back for the exercise of his discretion: in the other we should send it back for review. The ordinary rule is that, except where there are special circumstances, the expenses of a country attorney will not be allowed. As was clearly put by *Patteson, J.*, in *Archer v. Marsh* (12), "Of all things it is more particularly one for the Master's discretion; and it is a bad practice to interfere with that discretion, unless there has been something very wrong." There the Master had allowed the costs of a country attorney in addition to those of his London agent, under the peculiar circumstances of the case. Here the circumstances are no less peculiar. The Prothonotary in the exercise of his discretion has refused to allow Mr. Myers' costs as attorney, and has decided that he was not a material witness. There is no ground for interfering with his discretion.

As to the question whether Mr. Myers was a material witness, I can very well understand that he was a witness whom his clients would gladly have had at the trial. That is a matter as between solicitor and client. The case is quite different as between party and party. Of course, upon the assumption that Mr. Crispin would have given an untrue account of the interviews which he had with the directors, Mr. Myers might have been a material witness. But if that had been so, all the directors were present, and could have given evidence; so that I cannot see in what way he was a necessary witness. In the case immediately following *Chapman v. Rodway*, namely, in the case of *Knight v. The Gravesend Railway Co.* (13), these principles are concisely stated in the head note, which proceeds thus: "But where he (the Master) has exercised his discretion, although the Court will correct his decision if it is manifestly wrong, they will not do so when it is doubtful whether it is so." Putting Mr. *Rogers'* case at the highest, it can only be said that the correctness of the Prothonotary's decision is doubtful.

Application refused with costs.

Attorney for applicants: *Asher, for Myers* (Bombala).

Attorneys for defendants: *Oreagh & Williams.*

(12) 7 Dowl. 541.

(13) 27 L.J. Ex. 8.

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The rule is accurately stated in *Hill v. Peel* (7), by *Bovill, C.J.*, at p. 181, "where it is a question of whether the Master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed." The inquiry before the arbitrators being of a mere informal nature, a second counsel was unnecessary.

[DARLEY, C.J. Once you depart from the rules of evidence, counsel's labour becomes much more onerous.]

But much of the evidence that would have been necessary if the trial in Court had gone on, was dispensed with before the arbitrators.

Pilcher was not called upon to reply.

Darley C.J. DARLEY, C.J. I am of opinion that the Prothonotary was wrong in his decision. The case of *The North Illawarra Coal Co. v. The Commissioner for Railways* (1) establishes the rule on this very point. Sir J. *Martin, C.J.*, at p. 347, says: "It is not the fact that the discretion of the Prothonotary will never be interfered with where he disallows the fees of one or two or more counsel. The true rule is laid down in *Grindall v. Godman* (8), by *Patterson, J.*, 'I am always unwilling to interfere with the Master's taxation as to the matters peculiarly within his discretion, especially where it has been applied to questions of amount. In many instances they are matters of which I have no knowledge, and as to which, therefore, I can form no opinion. Here, however, I can judge of the question in dispute. It seems to me that two counsel ought to have been allowed.' " The principle is also laid down in *Galloway v. Keyworth* (9) at p. 231, where *Maule, J.*, says: "The Court does not sit strictly as a Court of Appeal from the decision of the Master. Costs of increase are allowed at the discretion of the Court; but that

(7) L.R. 5 C.P. 172.

(8) 5 Dowl. 378.

(9) 23 L.J. C.P. 218; 15 C.B. 228.

discretion is, for convenience sake, exercised through the Master. The Court has still an original jurisdiction." In this case the Prothonotary has not exercised the discretion of the Court in the proper manner. Let us look at the facts. It was a difficult matter for a jury to determine, and reference was made by the consent of the parties to skilled arbitrators. It was conceded that if the trial had gone on to verdict, the fees of two counsel would have been allowed. I cannot see why they should not have been allowed in taxing the costs of the arbitration. A case is often more difficult to conduct before arbitrators, because there is more difficulty in keeping the witnesses to what is strictly legal evidence, and arbitrators would often be placed in an embarrassing position without the aid of experienced counsel. In this case the difficulties were very considerable, and I think it was a case in which the second counsel's refreshers should be allowed.

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FAUCETT, J. The only question we have to decide now, is whether the Prothonotary exercised his discretion rightly or wrongly: that is, whether he exercised it in so unreasonable and improper a manner, that the Court will interfere with it. He seems to have acted upon a rule that in arbitration cases two counsel cannot be allowed. The facts seem to be these: Mr. *Pring* was retained as junior counsel at the trial, at an ordinary fee, and if the trial had gone on he would clearly have been entitled to the ordinary refreshers. But after the case was opened, it was referred to the arbitration of certain persons skilled in the very matters in issue. The result of the adoption of that course was that time was saved, and the evidence of skilled witnesses was not necessary. But it seems to me that these refresher fees were a natural consequence of retaining Mr. *Pring* at the trial. It might have been different if this had been originally a case of arbitration. I think the discretion of the Prothonotary was wrongly exercised.

Faucett J.

SIR G. INNES, J. I do not think I should be justified in taking up the time of the Court by repeating reasons which have already been given, and with which I agree.

Innes J.

Application granted.

Attorneys for plaintiff: *Macnamara & Norton.*

Attorney for defendant: *M'Laughlin.*

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BOROUGH OF NEWCASTLE v. LUDLOW.

Feb. 24. *Municipal by-laws—Knowingly causing interment of dead body within 100 yards of street—Evidence of knowledge.*

Darley C.J.
Faucett J.
and
Innes J.

An information was laid against L. for that she "did knowingly cause to be interred a certain dead body" . . . in a certain cemetery, "within a distance of 100 yards from a public street," . . . contrary to the by-laws, etc.

Held, that the magistrates were right in dismissing the case, in the absence of any evidence to show actual knowledge on the part of L. that the burial-place in question was within the prescribed distance.

APPEAL under the *Justices Appeal Act*, 45 Vic. No. 4.

By the additional by-laws of the borough of Newcastle it was provided:—3. "No dead body shall be interred in any existing cemetery now open for burials within the distance of 100 yards from any public building, place of worship, schoolroom, dwelling house, public pathway, street, road, or place whatsoever within the borough; and no body shall be interred in any new cemetery that may be hereafter opened within the said distance of 100 yards from any such public building, place of worship, schoolroom, dwelling house, public pathway, street, road, or place whatsoever within the said borough." 4. "Any person or persons having the charge of any cemetery, or other person or persons who shall knowingly inter or cause to be interred any body within the borough, contrary to the provisions of these by-laws, or otherwise commit a breach of any of them, shall for every offence be liable to any penalty not exceeding 50*l.* nor less than 5*l.*, and for every subsequent offence to any penalty not exceeding the first-mentioned amount nor less than 10*l.*"

An information had been laid against Mrs. Jane Ludlow, alleging that she "did knowingly cause to be interred a certain dead body—to wit, the body of one Mary Buxton—in the Church of England burial ground known as the Christ Church Cemetery, within the borough of Newcastle aforesaid, and within a distance of 100 yards from Church-street, a public street in the aforesaid borough, the said burial ground being at the time of the passing of the by-laws hereinafter mentioned a then-existing cemetery open for burials, contrary to the by-laws, &c."

The case was dismissed by the magistrates.

The complainants appealed.

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The following evidence was taken :—The mayor, who laid the information, proved that this was the fourth prosecution in connection with the burial of Mrs. Buxton. Neve, the undertaker, had been convicted and fined. The cases against Canon Selwyn, who conducted the burial service, and Mr. A. Buxton had been dismissed. E. S. Holland, town clerk, proved the by-law, &c. ; and J. Davey, inspector of nuisances, proved that he had measured the distance from the Buxton family vault to Church-street, and found it to be 75 yards. From the evidence of Walter Neve, the undertaker who conducted the funeral, it appeared he had acted upon instructions which he received from Mrs. Ludlow, the appellant, who said she wished to have her mother buried in the Christ Church Cemetery.

It did not appear from the depositions that he was asked any questions as to the distance of the vault from any public building, &c. Mrs. Ludlow, the defendant, was not examined.

The case had been already argued before the late Sir J. Martin, C.J., Windeyer, J., and Innes, J.

Rogers, for the appellants, now contended that the only point was whether the place was within the distance prohibited by the by-law, and whether the defendant knowingly caused the interment. The by-law had been held not to be *ultra vires* in *Ex parte Flack* (1), and in *Brooks v. Selwyn* (2). That being so, knowledge of the by-law must be presumed, on the principle *ignorantia juris non excusat*. *Nicholls v. Hall* (3) will be the chief case relied upon by the other side. In that case it was held that in order to convict the person in possession or charge of a diseased animal of an offence against an order of the Privy Council made under the *Contagious Diseases (Animals) Act*, 1869, it must be proved that he was aware of the fact that the animal was diseased. It is true that the by-law has the word "knowingly." But if persons bury within the borough, they must take care that they do not bury within 100 yards of any

(1) 1 N.S.W. L.R. 27.

(2) 3 N.S.W. L.R. 256.

(3) L.R. 8 C.P. 322.

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building, &c. *R. v. Sleep* (4) is another case they will rely on. There it was held, following *R. v. Cohen* (5), that in order to convict a person found in possession of naval stores, it must be proved that he was aware that the goods were marked with the broad arrow. But these cases do not touch the present case, because of the wording of the by-law.

[FAUCETT, J., referred to *Ex parte Lansdown* (6) as to the construction of the word "knowingly."]

A person buries within the borough at his peril.

[DARLEY, C.J. Is not the gist of the offence the burying within 100 yards of any public building, &c. ?]

Heydon, for the respondent, referred the Court to *Ex parte Meaburn* (7) as to knowledge. [He was stopped.]

Darley C.J. DARLEY, C.J., after reading the information, said :—This information does not quite follow the terms of the by-law. [His Honour read the 3rd by-law—*ante* p. 98.] The object of this by-law is to prevent interment within 100 yards of any public building, &c., and not to prohibit interring within the burial ground. Now, it appears to me that *R. v. Sleep* (4) and *R. v. Cohen* (5) are in point to show that the offence here is not interring within the cemetery, but "knowingly" interring within 100 yards, &c. Therefore, in this case, it is for the prosecution to make out that Mrs. Ludlow did knowingly inter the body of her mother within 100 yards of this street. It seems to me that there is no evidence that she knew anything of the matter. She was not present at the funeral. She gave instructions to the undertaker that her mother should be interred in the family vault in Christ Church Cemetery, and expressed a wish as to what kind of coffin she would have. In point of fact, it appears that the burial took place within 75 yards of the street; even if the respondent had been there, she probably would not have known whether the grave was 60, 80, or 100 yards from the

(4) 30 L.J.M.C. 170.

(5) 8 Cox. C.C. 41.

(6) 7 N.S.W. L.R. 434.

(7) 7 N.S.W. L.R. 342.

street, unless she is very skilled in judging distances. If the inspector of nuisances had gone to Mrs. Ludlow and said, "I have to caution you ; I have measured the distance of that vault from the road, and I find it is within 100 yards," evidence of that kind would have been conclusive ; but none such was given. It appears to me that the gist of the offence is the knowing that the place of interment is within 100 yards of a public place, &c. In my opinion, therefore, the decision of the magistrates was perfectly right.

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FAUCETT, J. I am of the same opinion. The *gravamen* of the charge is that the dead body was buried within a distance of 100 yards from a public street, in contravention of the 3rd by-law ; but in the 4th by-law, which prescribes the penalty for that offence, the word "knowingly" is introduced. It appears that Mrs. Ludlow knew that there was a family vault there, but there is no evidence to show that she was ever told or knew of the distance of the vault from any public place.

Faucett J.

SIR G. INNES, J. I concur. I do not wish to add anything more than that I was of the same opinion when the case was last argued.

Innes J.

*Appeal dismissed.. Decision of
magistrates affirmed with costs.*

Attorney for appellants: *Fergusson*, for *Mullen & Baker* (Newcastle).

Attorneys for respondent: *Ellis & Makinson*, for *H. J. Brown* (Newcastle).

PARK v. MUNICIPALITY OF CANTERBURY.

March 8.

Negligence—Alignment of "trust" road—Liability of municipality—Municipalities Act of 1867 (31 Vic. No. 12), s. 128.

Darley C.J.
Faucett J.
and
Innes J.

The defendant municipality, having been placed by the Government in charge of a public road in the place of trustees, and entrusted with the expenditure of the annual vote for the maintenance of the road, applied to the Government to align the road. The Government sent a surveyor to superintend the work, on condition that the municipality supplied men and materials.

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Held (INNES, J., *dubitante*), that as the road was not vested in them by proclamation, so as to place it under their care and management, under s. 118 of 81 Vic. No. 12, the municipality was not liable for injuries sustained by the plaintiff through the negligent placing of the alignment posts.

DISTRICT COURT APPEAL.

Action for damages for injuries sustained by the plaintiff, while driving along the Undercliff-road, in the defendant municipality, through his cart running into a post erected in the road for the purposes of alignment.

The road, as appeared from the correspondence put in evidence, was a trust road, which, upon the application of defendants in May, 1884, was placed under their charge as trustees, authority being given to them to control the expenditure of the annual vote of 75*l.* for its maintenance. It was admitted that the road was within the boundaries of the municipality. In August, 1884, the defendants requested the Government to align the road, and in a subsequent letter in January, 1885 (giving particulars of the required alignment), the defendants undertook to meet any claim for compensation that might be made, and to pay the costs of surveys, and also to be at the expense of erecting alignment posts.

The alignment was accordingly carried out under the direction of a Government surveyor, the defendants supplying the posts, and two men to erect them.

It was also proved that the defendants collected rates in respect of the property adjoining the road; and that they spent money out of the municipal fund on the footpaths; but that the carriage way was maintained solely out of the annual vote of 75*l.*; that although the width of the road, as marked out for alignment, was 66 feet, only about 15 feet was available for traffic, as had been the case before the alignment; that the post which had caused the accident had been placed about three feet within what was formerly the ordinary thoroughfare; and that there was no notice to warn the public of what had been done.

At the trial, *Wilkinson*, D.C.J., directed the jury that there was no evidence against the defendants, but asked them to assess the damages if they thought there was any evidence of negligence. It was agreed that the verdict should be entered

for the defendants, with leave to the plaintiff to move to have the verdict entered for the plaintiff for the amount assessed by the jury, if the Supreme Court should think that there was any evidence to go to the jury as against the defendants.

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O'Connor, for the plaintiff, asked, after the learned Judge had summed up to the jury, to be allowed to amend the plaint by inserting after the words "laid down" the words "and allowed to be laid down." This being objected to, his Honour refused to allow the amendment, as the question all along had been treated as if the defendants had laid down the post as alleged in the plaint.

The jury, having retired, returned the following verdict in writing:—"The jury decide the council are liable in erecting and allowing a post to stand on the Undercliff-road to the obstruction of public traffic, and give a verdict for the plaintiff for 25*l.* damages with costs."

A rule *nisi* having been granted to enter the verdict for the plaintiff,

O'Connor, for the plaintiff, in support of the rule. The post having been put in the middle of what was formerly used by the public as a roadway for 25 years, the defendants ought to have put up a notice or given some warning. The defendants were acting in exercise of the powers given to them by section 128 of the *Municipalities Act* of 1867 (31 Vic. No. 12). By the *Public Roads Act* (4 Will. IV. No. 11) the Government are empowered to grant an application for alignment; but there is no section in the Act which gives them any power to separate the carriage-way from the footway. The municipality alone has power to do that.

[DARLEY, C.J. What the 128th section of 31 Vic. No. 12 provides that the council shall have the same power as the police magistrate and others have under the *Towns Police Act* (2 Vic. No. 2).]

But by s. 45 of that Act, the Surveyor-General, one of the persons mentioned in s. 128 of 31 Vic. No. 12, is empowered to

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set out the carriage and footways, and do the very things that were done here.

[DARLEY, C.J. True; but s. 45 of 2 Vic. No. 2 is not referred to in s. 128 of 31 Vic. No. 12.]

The Government cannot align except in towns. In this case the Government sent a surveyor on condition that the council would find the labour. The council having accepted those terms, and authorised the work on a road, within the boundaries of the municipality, cannot escape liability.

[DARLEY, C.J. The letter from the council to the Government shows that the council regarded it as a Government road.]

The Government surveyor, by the terms of the agreement, became the servant or agent of the council in the matter. Even if the road was not under their care and management within the meaning of s. 118 of 31 Vic. No. 12, the municipality having undertaken the work are liable for negligence. In *Halter v. Moore* (1) it was held that the defendants were responsible for the injury, although they were acting gratuitously on behalf of the public or Government, and expending within their district money voted for the work, the negligent performance of which caused the injury complained of. It cannot be argued that because the Government surveyor had no right to be there the defendants are not liable.

O. B. Stephen for the respondents. The whole question is whether the defendants had authorised what was done so as to make them liable, assuming that the post was put in negligently. The road still continued to be a public road, although the council had the handling of the 75*l.* which Parliament annually voted for the maintenance of the road. Whether it is called an alignment or not, the Government had power to mark out or define the road. At the time of this aligning, there had been no formal vesting of the road in the municipality, as required by s. 118 of the Act 31 Vic. No. 12. Sec. 128 does not in any way

(1) 3 S.C.R. 65.

make the defendants liable. Then comes the question whether, this being a perfectly lawful request by the municipality, the defendants were responsible for the acts of the Government surveyor. He was not the servant or agent of the defendants. [He also argued that there was no negligence in the way in which the post had been put in.]

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O'Connor in reply. The jury could have found their verdict on no other ground than that the defendants had been guilty of negligence. That verdict being reasonable, the Court will not interfere.

DARLEY, C.J. In this case the verdict was entered for the defendants, and I think that verdict should not be disturbed. There is nothing to show that this was done under the authority of the municipality. *Darley C.J.*

This appears to have been a parish road under the charge of the Government, who at one time placed it in the hands of a trust, and paid a sum of 75*l.* for its maintenance each year. It was subsequently placed by the Government under the control of the municipality, and they received the sum that had been formerly paid. But it was under their control as trustees, and not as a municipality within the meaning of ss. 117 and 118 of 31 Vic. No. 12. In applying to the Government to align the road, the municipality were acting under the powers conferred upon them by s. 128 of the *Municipalities Act* of 1867 (31 Vic. No. 12). The 118th section of that Act shows that a public road in the hands of trustees can only be vested in the municipality by proclamation, so as to give the municipality full power over the road, and make them liable for its construction and management. That was not done, and although the road was within the area of the Municipality, that section has no application to the case. So far as the municipality were concerned, they had no power to align or mark the road. So far as the Government were concerned, it is doubtful if they had power to put aligning posts on the road, or to bring into operation the Act 17 Vic. No. 10, which applies only in towns. I should have thought it would have been enough for the Government to have pointed out the boundaries,

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which they had the power to do, and also to place a boundary fence along it on each side. That being the state of things, the municipality applied to the Government to align the road. Two surveyors were sent to carry out the work, and they marked out the alignment, and under their direction the posts were erected. No doubt there is some difficulty in deciding who is responsible for the putting in of the posts. The surveyors swore that they pointed out the places where these posts should be put in, and that they made the alignment marks; that they put in proper posts; that they were working for the Government, and paid by the Government; that the two men sent by the municipality to the surveyors for the purpose of carrying out the work only obeyed their orders. As I understand the facts, there was no necessity for posts being placed in this particular place. It was at a turning of the road, which at this place was only 15 feet wide; there was a cliff and a steep declivity, and the road sloped down on one side and was filled up on the other. It was unfortunate that posts were erected there; still the municipality are not responsible for what has been done. If the verdict of the jury is to be taken as implying negligence on the part of the municipality, it was a wrong finding. I think, therefore, that the verdict as entered by the learned Judge must stand.

Faucett J.

FAUCETT, J. I confess I have some difficulty about the matter, but on the whole I agree with his Honour. The municipality had a perfect right to request the Government to do what they did, but that cannot make the municipality responsible for what the Government did. How can it be said that the municipality are liable, because they asked the Government to align the road? The road was not really a municipal road within the meaning of ss. 117 and 118 of the *Municipalities Act*; and I concur with the view which his Honour has expressed as to this being a parish road over which the municipality had the power conferred by s. 128 of the *Municipalities Act*. If I am right in thinking that the Government alone did this, then the defendants cannot be liable. But if it did not appear that the Government did this act, as entirely within their power, and one which they alone had the right to do, I might be of a different opinion. There is

another point. The Government seem to have said—"We will make this road. We alone can do it; and, if you will lend us some of your workmen, we will do it." It seems strange that the Government should do this; but it would be certainly very hard to make the municipality liable for the negligence of the Government in doing what they did. Moreover, I can see no negligence in the manner in which the posts were placed. They were in the line of alignment and the line of kerb. Therefore, they were not negligently placed. The negligence, if any, was not in putting in the posts, but in not placing some warning to show the public, for some time at all events, that the posts had been put down. As to the height of the posts, I certainly think it is less dangerous to have a post four feet high than a peg of six inches. On the whole, I am of opinion that the learned District Court Judge was right, and that the municipality were not liable.

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SIR G. INNES, J. This is a very peculiar case, and not so satisfactorily brought before the Court as it might have been. I think it must be conceded that the case stated by the Judge shows that there was some evidence on which the jury based their conclusion that the defendants were guilty of negligence. It must be taken that the post was put in the highway, which people had been accustomed to use for some years by night and by day. I confess that I, for my part, feel inclined on that part of the case to support the finding of the jury, and to regard it as being a question of fact with which we cannot interfere. I say that I am inclined to think so, because I am not so strong in my opinion as to feel justified in dissenting from their Honours. But I can only concur with the very gravest doubt for these reasons. The defendants may not have had the control and custody of the road within the meaning of s. 118 of the *Municipalities Act* of 1867; but still they had been invested by the Government with the power over the road which had been formerly enjoyed by the trustees. They had obtained the transfer of the 75*l.*, and they had themselves so far taken the matter out of the hands of the road trustees. They had also spent money on the road out of the funds of the municipality, as well as the 75*l.* Everything was in train to vest the whole control of the road in them. That

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being so, they request the Government to send surveyors to survey and mark out the road, they themselves undertaking to place workmen at the disposal of the Government surveyor, with the knowledge that these alignment posts would be placed at the line dividing the path from the roadway. They knew that alignment posts were to be put there, and they authorised their servants to assist in the work. As that work was done without proper safeguard, it seems to me that, it having been done by their paid servants, though under the Government surveyor, they should be regarded as responsible. However, their Honours hold a very strong view the other way; and though I should have been better pleased if our decision had been different, I do not feel strong enough in my opinion to dissent.

Rule discharged, with costs.

Attorney for plaintiff: *F. Gannon.*

Attorney for defendants: *Pigott.*

March 9.

Ex parte MOORE, In re JEANNERET.

Darley G.J.
 Faucett J.
 and
Innes J.

Municipal election—Sydney Corporation Act (43 Vic. No. 3), ss. 8 and 60—Votes improperly received—Names wrongly on list of citizens—Onus of proof.

At the election of an alderman for Bourke Ward, in the city of Sydney, J. was elected by a majority of four votes over M., the applicant. By section 8 of the *Sydney Corporation Act* (43 Vic. No. 3), a list of citizens capable of voting must be prepared for each ward, so as to contain, in accordance with Schedule D, the Christian name and surname of each person. This list, when revised, becomes the roll, according to which the votes are recorded. On the roll then in force were the names of sixty firms or trading companies, entered thus, "Abbott & Dodds," "Brown & Co.," &c., and votes were proved to have been received in respect of at least fifteen of these firms.

Held, that such votes were improperly recorded, and, inasmuch as it was impossible to ascertain whether the successful candidate would have obtained a majority if they had been rejected, the election was invalid.

A mere irregularity or breach of the electoral law does not necessarily vitiate an election, if it can be shown that it did not affect the result of such election.

MOTION to make absolute a rule *nisi*, granted under section 50 of the *Sydney Corporation Act* (43 Vic. No. 3) (1) calling upon Charles Edward Jeanneret to show cause why he should not be ousted of his office as alderman for Bourke Ward, in the city of Sydney. The grounds of the rule *nisi* were :—1. That the said C. E. Jeanneret, whilst holding civic office, was and continued to be engaged and interested in a certain contract or agreement and employment with the council of the city of Sydney. 2. That at the election of an alderman for Bourke Ward, on the 1st December, when the said C. E. Jeanneret was declared duly elected, the returning officer allowed a number of persons to vote for and on behalf of certain firms or partnerships, whose names appeared on the citizens' list, in respect of certain qualifications and votes shown therein. 3. That at the election the returning officer refused to allow Edward Chisholm, a member of the firm of Brown and Co., whose name appeared in the citizens' list, to vote on behalf of the firm of Brown and Co.

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C. B. Stephen, in support of the rule, said he did not intend to argue the third ground.

[*FAUCETT, J.* Do you show that under the second ground the result of the election would have been affected if the votes alleged to have been improperly recorded had not been received ?]

(1) 43 Vic. No. 3, s. 50 enacts :—" If it shall appear upon affidavit that any person declared elected to be mayor or an alderman or auditor has been unduly elected, or that any person has been elected to or holds or exercises such office of mayor, alderman, or auditor, and is incapable under the provisions hereof of being or continuing such mayor, alderman, or auditor, it shall be lawful for the Supreme Court, or any Judge thereof, to grant a rule or order calling upon such person to show cause to the Court why he should not be by the said Court ousted of the said office, and upon the return of such rule or order, if it shall appear to the Court that such person

so elected, or holding or exercising such office respectively, was unduly elected, or was at the time of his election, or while holding or exercising such office, incapable under the provisions hereof of continuing such mayor, alderman, or auditor, as the case may be, the Court may make such rule or order absolute, or may discharge such rule or order, and in either case with or without the payment of costs to or by either party, as the Court shall deem meet, and the person against whom any rule shall be made absolute as aforesaid shall be deemed thereby to be ousted of such office accordingly."

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Yes. Mr. Moore was only four votes behind; and sixty persons may have voted in respect of firms or partnerships that were on the roll. It is enough for me to show that the number of votes wrongly recorded was sufficient to cause the difference between the two candidates.

[FAUCETT, J. Do you ask us to declare Mr. Moore elected?]

Yes, if we succeed on the first ground. I rely upon section 13 (2) and section 14 (3) of 43 Vic. No. 3. Section 13 applies to disqualifications of persons from becoming aldermen; section 14 to disqualifications of persons after they have become aldermen. The contract in the present case was a lease from the council, under which Mr. Jeanneret, who had for many years been the owner of the Parramatta River steamboats, was lessee of the municipal council of a wharf at the foot of King-street.

[FAUCETT, J. How can you take that point until Mr. Jeanneret has been convicted of an offence under section 14?]

We say that under section 50 he was "at the time of his election," and "while holding or exercising" the office of alderman, "incapable under the provisions hereof of continuing such alderman."

[DARLEY, C.J. Is it not the being convicted for being interested in the contract, not the being so interested, that causes the disqualification?]

(2) 43 Vic. No. 3, sec. 13:—"That every Judge of a Supreme Court or of a District Court, and every person who holds any place of profit under the Crown or the council, or who is a military or naval officer on full pay in any force other than the Volunteer force of this colony, and every person of unsound mind, and every uncertificated insolvent, or person who has compounded with his creditors, shall be disqualified from being elected, or from continuing to hold the office of alderman or auditor."

(3) 43 Vic. No. 3, sec. 14:—"That

any person who while holding any civic office under this Act shall continue to be or shall become directly or indirectly, by means of partnership with any other person, or otherwise howsoever, knowingly engaged or interested in any contract, agreement, or employment, with or on behalf of the council, except as a shareholder, but not being a director in any joint stock company, shall be liable to a penalty not exceeding 100*l.*, nor less than 50*l.*, and shall be for three years thereafter disqualified from holding any civic office."

As to the second ground, the affidavits show that at least fifteen persons voted for or on behalf of firms or partnerships, e.g., Mr. Devlin voted in respect of the qualification "Harrison, Jones, and Devlin, Loftus-street, 4 votes;" Mr. T. S. Buller was allowed to vote in respect of "Charles Moore and Co., 4 votes;" Mr. Watt in respect of "Gilchrist, Watt, and Co., 4 votes." The names of the firms and not of the individuals were on the roll. In one instance a clerk voted for "Henry Bull and Co." These votes were received in direct violation of section 8 (4) of the *Sydney Corporation Act* (43 Vic. No. 3), which shows when and how the list of voters is to be made up, and refers to Schedule D, which requires that the Christian name and surname of each person should appear in the list.

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[DARLEY, C.J. Section 12 provides that:—"No citizen whose name does not appear on the roll shall be entitled to vote at the election of any alderman or auditor, and then only for such ward or wards as by the roll it appears such citizen is entitled to vote in and for, and for such period only as the roll shall, under the provisions of this Act, be in force." Therefore, no one, unless his name is on the roll, is entitled to vote. Therefore Mr. Watt's name, for example, not being on the roll, he was not entitled to vote.]

Section 31 also shows that these firms were improperly placed on the roll. That section provides that "No question shall be put to any person applying to vote at any election of a mayor, alderman, or auditors other than the following: 'Are you the person named as —, number —, in the citizens' roll for — ward?'—(the name and corresponding number being at the time mentioned to him)—and no person shall be allowed

(4) 43 Vic. No. 3, section 8:—"On or before the first day of July in every year a list shall be made for each ward by the town clerk of all persons capable, under the provisions of this Act, of voting in and for the election of the mayor, aldermen, and auditors, and such list shall be alphabetically arranged according to the form in Schedule D hereto, and shall be made up from the receipts for city rates paid to the 30th day of June each year, &c." The Schedule D provides the form in which the list of citizens is to be drawn up, i.e., under the following headings:—The number in the rate-book, Christian name and surname of each person, residence, and number of votes.

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Ex parte Moore. How can a firm answer these questions? Who is to exercise the voting power of a limited company? The first shareholder, or the legal manager, or a clerk? *Woodward v. Sarsons* (5) shows that where an election does not result in the return of the candidate chosen by the majority, it is not conducted according to law. Here mistakes have been made, I do not say wilfully, but so as to invalidate the election.

[The COURT called upon *Barton* as to the second ground, intimating that if they decided that ground against him, they need not decide the point arising under the first ground.]

Barton, for the respondent, as to the second ground. Without disputing that votes were improperly recorded on behalf of these firms, there is nothing to show that the respondent benefited by them. In *R. v. Cousins* (6) it is laid down that “An application for a *quo warranto* information will not be granted on the ground of the badness of some of the votes given in favour of the defendant, unless it can be shown by the relator that if the votes complained of are rejected the defendant would be in a minority.” It must be shown that the election was turned against the applicant by this voting.

[DARLEY, C.J. How can that possibly be shown when the voting is by ballot?]

People could come and swear which way they voted.

[DARLEY, C.J. It seems to me that as soon as any one voted in respect of these companies or firms, the election became void *ab initio*.]

[FAUCETT, J. I do not go quite so far as that. These votes may be bad, but I do not think it necessarily follows that the election is therefore bad. As to *R. v Cousins* (6), does it not follow the principle of law in force at a time before the adoption of voting by ballot?]

I submit that it is for the other side to show that it would have affected the result. The onus is not upon us to show that we

should have been elected, whether or not these votes were rejected. 1887.

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DARLEY, C.J. We think it is unnecessary to express an opinion upon the first ground, upon which the rule *nisi* was obtained, namely, as to whether Mr. Jeanneret was interested in a contract with the corporation—the point which arose under the 13th and 14th sections of the Act. *Darley C.J.*

As to the second ground, I am of opinion that there has been a miscarriage of the election. On the 18th December, 1886, an election was held for an alderman for Bourke Ward, in this city. At that election there were two candidates, Mr. Jeanneret and Mr. Moore. Mr. Jeanneret polled 602 and Mr. Moore 598 votes. Mr. Jeanneret thus had a majority of four votes over Mr. Moore. It also appeared that there were some 60 votes recorded—in whose favour could not now be ascertained, there being no proper means of discovering—under these circumstances. There were placed on the citizens' list for Bourke Ward the names of a number of firms, who represented these 60 votes. For instance, there are the firms of Abbott and Dodds; Arnold, Gee, and Co.; T. Barre and Co.; John Fairfax and Sons; Gotthelf, Feldheim and Co.—and in respect of all these firms some representative voted. In some instances a member of the firm voted; in other cases some one unconnected with the firm, perhaps a clerk in the office, acting under instructions received from his masters, recorded the vote of the firm. There were altogether some 60 votes given in that way. Now, under the 8th section of the *Sydney Corporation Act* (43 Vic. No. 3), a list has to be prepared in accordance with a form contained in Schedule D of the Act, and that form shows that the Christian names and the surname of each citizen are to be stated in the list. Then under the 12th section it is provided that “no citizen whose name does not appear on the roll shall be entitled to vote at the election of any alderman or auditor, and then only for such ward or wards as by the roll it appears such citizen is entitled to vote in and for, and for such period only as the roll shall under the provisions of this Act be in force.” Now, take the first name on the roll, “Abbott and

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Dodds." The Christian name of neither of these gentlemen appeared. Therefore, that entry was not in accordance with the Act. Who is the "citizen" who is to vote in respect of that qualification? Is it Mr. Dodds or Mr. Abbott? Take the name "Brown and Co." There may be no member of the name of Brown in the firm. In fact, it was stated in the affidavits in this case that a Mr. Chisholm applied to vote as Brown and Co. Was that in accordance with the Act? It clearly was not. There was no "citizen's" name on the roll in respect of that qualification; no person could come forward and say, "That is my Christian name and my surname, and I claim to vote in respect of that qualification." I am of opinion, therefore, that the votes which were recorded in respect of these firms—these sixty votes—were wrongly received; and that the names of firms ought not to appear in the citizens' lists in that way. Can we say that the election was not thereby affected? Can we say whether these votes did or did not turn the election in favour of Mr. Jeanneret? We have been referred by Mr. Barton to the case of *R. v. Cousins* (6), and I think the law is there correctly laid down by *Milford, J.*, who said: "It is doubtful whether these persons were entitled to vote or not; but however that may be, it appears that exclusion of these votes would not affect the result of the election." Can we here say that the exclusion of these 60 votes would not have affected the result of the election? It is impossible for us to say so, and that being so, we are bound to hold that this gentleman was not duly elected. The same reasoning would have applied to Mr. Moore if he had been elected by a majority of four votes. *Wise, J.*, in that case, is reported as saying: "In the present case it was necessary to show that there was ground for supposing that the reception of these votes turned the election in favour of the elected, that is, the defendant." If the report be correct, then the law, as stated by that very accurate and learned Judge, though applying to English law, does not apply to the state of things here. According to that decision, it would be necessary in this case to show that the 60 votes were recorded for Mr. Jeanneret, or that a sufficient number were recorded to give him a majority of four votes? It is clear that that passage is not the law applicable

to the condition of affairs in this colony, although it was applicable to the state of things existing in England at the time. The case cited by Mr. *Stephen—Woodward v. Sarsons* (5)—lays down the proper principle to be applied in this case. Lord Chief Justice *Coleridge* there said : “ An election is to be declared void if it was so conducted that the tribunal which is asked to avoid it is satisfied as a matter of fact, either that there was no real election at all, or that the election was not really conducted under the subsisting election law. The tribunal should be so satisfied if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting for want of the machinery necessary for so voting, as by polling stations being demolished or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent declaration of votes or false declaration of numbers by a returning-officer, or by other such acts or mishaps ; and we think the same result should follow if, by reason of such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament.” It appears to me that this case exactly falls within the latter part of that principle. It is quite possible to believe that the majority of the electors, by means of the irregularities in the mode of conducting the election, have been prevented from electing the candidate of their choice. It

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is within the range of possibility that the whole of these persons may have recorded their votes in favour of Mr. Jeanneret, the successful candidate; and it is quite possible, at any rate, that the majority of them gave the majority of four votes which placed him at the head of the poll. That being so, it seems to me that this case comes within that principle; and I am of opinion, according to the words of the 50th section of the *Sydney Corporation Act*, that Mr. Jeanneret has been unduly elected to the office which he holds.

Faucett J. FAUCETT, J. I am of the same opinion. I think *Milford, J.*, in *R. v. Cousins* (6), with the usual conciseness which we know that learned Judge was accustomed to display, has put the matter in a very few words. [His Honour read the passage cited by DARLEY, C.J.] So that the question is this: Are we to act upon the same principle in this case? We must as far as possible. [His Honour reviewed the facts.] In my opinion the names of these firms improperly appeared on the roll. It appears that 602 votes were given for Jeanneret and 598 for Moore, giving Jeanneret a majority of four only. But if we were to exclude the 60 votes improperly received, we could not see what the result of the election would have been, as they could in *R. v. Cousins* (6) after rejecting the three votes. We cannot see one way or the other how these persons voted. But if we could, I do not think it would be advisable, as it would tend to destroy the advantages of voting by ballot. In England that principle was acted upon before the passing of the *Ballot Act*, but we have to consider whether the same principle applies here, where we have voting by ballot. Therefore, I think that *Wise, J.*, has laid down the wrong principle in *R. v. Cousins* (6), and I think he was carried away by the English cases. He does not seem to have perceived that he was in an altogether different atmosphere. I think the decision in *R. v. Cousins* (6) is perfectly correct, but I venture to dissent from the opinion of *Wise, J.* In setting aside the election of Mr. Jeanneret, we do not validate the election of Mr. Moore.

Innes J. SIR G. INNES, J. I am also of opinion that the rule should be made absolute. I quite agree with his Honour Mr. Justice

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Faucett in thinking that a mere irregularity or breach of the electoral law would not be enough necessarily to vitiate the election merely on the ground of such irregularity, if it is clearly shown that it did not affect the result of the election. I think the respondent could have successfully resisted this application, if he could have shown that thirty of these votes had been recorded for his opponent, as he would still have had a clear majority of four. I am not prepared in any way to find fault with the decision in *R. v. Cousins* (6). The judgment of *Milford, J.*, seems to me to be unimpeachable; but the dictum of *Wise, J.*, goes too far.

The distinction is very well and clearly pointed out in the case of *Woodward v. Sarsons* (5), which, being a case where the election was by ballot, is applicable in its principle to the case which we are now considering. At p. 743, *Lord Coleridge, C.J.*, delivering the considered judgment of the Court, says:—"We are of opinion that the true statement is that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer." At the conclusion of the judgment at p. 751 this passage occurs:—"The non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or, in other words, the result of the election."

Now it seems to me that these are the principles which govern a case of this kind; and applying them to the facts of this case, it is impossible for this tribunal to say that this mistake may not have affected the result of the election.

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Before I finish, I think it right that the Court should draw attention to the extraordinary way in which this list of citizens is prepared. I think I am speaking within bounds when I say that at least 150 names out of 498 had been placed on the list in direct contravention of the Act. A difficulty may arise with regard to any ward declaring what candidate should be elected so long as the list remains in its present condition. It does seem strange that the Revision Court—which consists, I think, of the mayor and two aldermen—could have allowed so many violations of the Act as appears on this list. They should put down the Christian name and the surname of each person entitled to vote. They have the schedule to guide them. But here in the very first page we have dozens of firms described as “Abbott and Dodds,” “Allardyce and Co.,” and so on. To say the least of it, there seems to have been a perfunctory discharge of duty, and it is not easy to understand how, in the face of explicit regulations, this practice could have passed muster. I hope that one of the results of this decision will be that more regard will be paid to the revision of the lists in the future, and that they will be prepared in accordance with the requirements of the law.

Rule absolute, with costs.

Attorneys for applicant: *Stephen & Ickerson.*

Attorneys for respondent: *Allen & Allen.*

March 7, 10.

GOLDSBROUGH & CO. v. MACMAHON.

Darley C.J.
Faucett J.
and
Innes J.

New trial—Application to Judge for leave to institute prosecution for perjury—Criminal Law Amendment Act (46 Vic. No. 17), s. 300—Postponement of new trial motion refused.

Upon an application for leave to institute proceedings for perjury under s. 300 of the *Criminal Law Amendment Act*, it is the duty of the Judge to decide whether the applicant is acting *bona fide* and not from vexatious or harassing motives; it is for the magistrate, and not for the Judge, to decide whether there is a *prima facie* case against the accused.

The Court refused to adjourn the argument of a new trial motion, in order that a prosecution of certain witnesses for perjury, in respect of the evidence given by them at the trial, might be instituted.

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THE action was for the conversion of 2290 sheep, for which the plaintiffs claimed 1400*l*.

The sheep in question, which had been sold to the defendant in 1883 by Thomas and Peter Besnard, who were in partnership as graziers, were claimed by the plaintiffs as being included in a mortgage to them by the Besnards executed in 1882. In 1884 the Besnards were made insolvent, and the plaintiffs took possession under the mortgage.

At the trial on 10th, 13th and 14th September, 1886, before *Faucett, J.*, and a jury of four, a verdict was returned for the defendant.

On the 25th October, a rule *nisi* for a new trial was granted, on the ground that the verdict was against evidence.

On the 14th February the plaintiffs applied, under s. 300 of the *Criminal Law Amendment Act* (46 Vic. No. 17), to *Faucett, J.*, for leave to prosecute the Besnards for perjury. *Faucett, J.*, declined to hear the application at that stage, on the ground that proceedings for a new trial were pending.

On March 7th, the new trial motion being called on for argument, March 7.

B. Barton (*O'Connor* with him), for the plaintiffs, moved (on notice) that the argument might be adjourned in order to give the plaintiffs time to apply for leave to prosecute Thomas and Peter Besnard for perjury; and, in the event of that leave being obtained, for a further adjournment until the criminal proceedings should be terminated.

[*DARLEY, C.J.* Suppose these witnesses were convicted of perjury, how would you be in a better position for moving?]

I should rely on *Longworth v. Campbell* (1). To grant the present application would avoid circuitry. We might fail to get a new trial now, and still the witnesses in question might be

1887. convicted of perjury. It is laid down in *Paley on Convictions* (6th Ed.) p. 86, that "As a general rule, magistrates ought not to entertain criminal charges arising out of civil proceedings which are still pending, at all events, except for the purpose of holding the accused person to bail, unless the cause has been postponed to allow the criminal charge to be first disposed of." *B. v. Ashburn* (2) is cited as an authority for that proposition. In that case, although the trial of an indictment for perjury against a witness in a civil cause was ordered by *Parke, B.*, who presided at the Central Criminal Court, to be postponed till the rule for a new trial should be argued, *Littledale, J.*, subsequently enlarged the rule for a new trial in order that the indictment might be tried before it came on for argument. This case turned on the evidence of these two witnesses, and upon their evidence, which we say was false, the new trial motion hinges.

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An affidavit of A. R. Minter, one of the attorneys for the plaintiffs, was read, stating that the plaintiffs could not have anticipated the evidence given by the Besnards; that their evidence took the plaintiffs by surprise, and it was impossible for them to obtain evidence to contradict it in time. The affidavit went on to set out the inquiries that had been made as to the truth of the Besnards' statement, and contained a full statement of facts tending to show that their evidence was false.

[DARLEY, C.J. The question really was whether the sheep were within the mortgage or not.]

Yes; and the jury thought that because the defendant had paid for them once he ought not to pay for them again.

Foster, Q.C., A-G. There is not even a *primâ facie* case for this application. There must be a probability that the prosecution for perjury will succeed. That the present application is only made for the purpose of delay, is shown by the fact that the application for leave to prosecute was only made to Mr. Justice *Faucett* on the 14th February, after an interval of four months. Again, the Court will not grant this application on an

affidavit of the plaintiffs' attorney only. It is merely hearsay. There should have been affidavits by the persons who gave him the information. Such an affidavit would not be sufficient to support an application for a new trial, on the ground of surprise. The effect of granting this adjournment would be that the Judge and this Court would stamp the case with their *imprimatur* that there is a *prima facie* case of perjury.

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[SIR G. INNES, J. I do not think that follows. A Judge who grants leave to prosecute witnesses for perjury, is not necessarily of opinion that there is a *prima facie* case. He may think it proper to grant the application without expressing any opinion.]

[DARLEY, C.J. The difficulty I feel is this: this application involves two applications; first, leave to proceed with an indictment for perjury; secondly, the adjournment of the argument on the rule.]

[FAUCETT, J. I think it would be difficult for me to decide the first point without some expression of opinion from the Court now.]

Barton in reply. It is not necessary that the Judge who has to grant leave should be satisfied that there is a *prima facie* case, provided that he thinks there is reasonable ground for the application, and that it is made *bonâ fide*.

[FAUCETT, J. What is reasonable ground but the establishment of a *prima facie* case?]

The main question is whether the application is made vexatiously (see note to section 300 in Sir A. Stephen's edition of the *Criminal Law Amendment Act*). The object of the section was to prevent vexatious proceedings by disappointed litigants. It was never meant that the same evidence should be brought before the Judge, to whom the application for leave to prosecute is made, as would be necessary before the magistrate who has to adjudicate upon the information.

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DARLEY, C.J. If I am to express an opinion, I may say that I think that the object of section 300 of the *Criminal Law Amendment Act* is (as pointed out in the learned editor's note) to prevent vexatious proceedings by unsuccessful litigants. The leave of a Judge must be obtained before proceedings for perjury can be instituted. For the institution of a prosecution, two things are necessary. First, the leave of a Judge must be obtained; secondly, a *primâ facie* case must be made out before the justices, before whom the information is laid. The Judge need not be satisfied that there is a *primâ facie* case. If so, why should it be necessary to bring the matter before the magistrates? Why should not the Act give the Judge power to commit without any further unnecessary steps? It is simply for the Judge to say that the party desirous of instituting proceedings is acting *bonâ fide*, and not from vexatious or harassing motives. It appears to me absurd to suppose, that first of all there is to be a *primâ facie* case laid before the Judge of the Supreme Court, and then an appeal, as it were, to a magistrate from his decision.

I think, therefore, that it is for the Judge to determine the *bona fides* only, and for the magistrate to say whether there is a *primâ facie* case.

It will be noticed that I avoid giving any opinion on this particular case. I merely give my opinion on section 300 of the Act.

Faucett J.

FAUCETT, J. It is very difficult to say what *bonâ fide* means in such a case. We have a person, against whom a verdict has been given, who wants to get rid of that verdict. That is his primary motive. I cannot see (without questioning in the slightest degree the respectability of the plaintiffs, and that they are *bonâ fide* in their intention to prosecute) that the real question has been decided by the Court, and that is, whether the Court will allow these proceedings to go on.

Innes J.

SIR G. INNES, J. I am not sorry that the opportunity has been given us of expressing an opinion as to section 300. I entirely agree with his Honour the *Chief Justice*, that the Judge

who grants permission to institute a prosecution for perjury does not necessarily stamp the transaction with his *imprimatur* that there is a *prima facie* case, whatever he may think. A malicious motive is not of itself a bar to the institution of proceedings for perjury, where perjury has been committed. The object is to prevent vexatious proceedings. The following section, the 301st, deals with the other case in which the Judge has to decide whether there is a *prima facie* case or not. In that case the matter is not of necessity sent down to the magistrate at all; the Judge commits. Under that section the case does go down for trial with the *imprimatur* on it, that the Judge was of opinion that a *prima facie* case had been made out.

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Under section 300, the Judge is simply to interpose where a prosecution might be instituted out of mere spleen or vexation at defeat.

The question now is, what is to be done on application to a Judge? I desire to say, so far as it can be of any use, that I do not think the Judge can in any way prejudice the position of an accused by sending a matter down for prosecution.

FAUCETT, J. It will be clearly understood that I have expressed no opinion on the merits so far; and if I do not altogether agree with their Honours as to the construction they put upon s. 300, I am far from dissenting.

Faucett J.

DARLEY, C.J. The application stands over, then, till Thursday next, to enable the plaintiffs to make an application to the Judge for leave to prosecute under s. 300.

Darley C.J.

The case was then adjourned in order that a fresh application, under section 300 of 46 Vic. No. 17, might be made to *Faucett, J.*, who subsequently granted the plaintiffs leave to prosecute the two *Besnards* for perjury; and

On March 10th,

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Barton, for the plaintiffs, resumed the application for a postponement of the arguments on the rule.

Foster, Q.C., A.-G. There is no guarantee that the prosecution will be proceeded with.

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Barton. Would not the adjournment be in the interests of justice? It is said that the plaintiffs are unfairly attempting to do away with witnesses; but it is obvious that they will not be got rid of, unless they are convicted of perjury. It would surely be more convenient to wait until the two grounds of perjury, and that the verdict is against evidence, can be argued together. Even if we got a new trial now, our hands would be tied, because they would apply to have the criminal proceedings stayed pending the fresh civil proceedings. If the postponement be granted now, the argument would come on next term, supposing that in the meantime the prosecution for perjury takes place. If the prosecution failed, the Court would be in a better position for coming to a conclusion on the other ground. If the testimony we complain of is perjured, it is not right that the defendant should have the benefit of it.

Darley C.J. DARLEY, C.J. Contrary to the conclusion which I had formed at first, my opinion is that this application cannot be granted. It must be admitted that this is a novel application. I do not know of any such case. It is in point of fact inverting the order of proceedings. As a rule, criminal proceedings are postponed until civil proceedings are concluded. In cases of this kind, which were more frequent formerly than now, the Courts have declined to interfere, on the ground that they might prejudice the position of the parties. In *Warwick v. Bruce* (3) Lord *Ellenborough* discharged with costs a rule to stay execution till after the trial of an indictment against the plaintiff's witnesses for perjury. There, Lord *Ellenborough*, C.J., said, "It would be highly dangerous to allow this rule to be made absolute. For this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment by indicting some of the plaintiff's witnesses for perjury." And the report concludes, "Because this seemed to be a new and dangerous experiment, the Court directed the rule to be discharged with costs." In *Thurtell v. Beaumont* (4), which was an action against an insurance company, the Court refused to grant a rule *nisi* for a new trial, on the ground that

(3) 4 M. & S. 140.

(4) 1 Bing. 339.

subsequently to a verdict for the plaintiff the grand jury had found a bill against him and others for a conspiracy to defraud the insurance company in that very matter. Although that was not a case of perjury, the principle is exactly the same. In that case, *Park, J.*, said: "In one case where the ground of the motion was that a bill for perjury had been found against the principal witnesses, Lord *Mansfield* said, that the granting of the rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a party to delay execution by indicting his adversary's witnesses." *Warwick v. Bruce* (5) is also referred to by *Park, J.*, and accordingly the rule was refused. So in a case which goes very far — unnecessarily far — *The Attorney-General v. Woodhead* (6), the Court refused a rule for a new trial where the motion was made on an affidavit, charging the material witness with perjury, and it was further stated that a grand jury had found the bill; and *Thompson, C.B.*, said: "It would be pregnant with the greatest mischief if even a conviction of perjury, on evidence given by a witness, were to be received in answer to a verdict."

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Following these authorities, it would, in my opinion, be extremely dangerous to grant this application.

Supposing it were the application of a defendant, against whom a large verdict had been given, it is at once apparent that great injustice might be done. Besides, as stated by Mr. *Attorney-General*, the fact that the Court had adjourned a civil case, in order to allow a prosecution to proceed, could not fail to prejudice the proceedings; whereas by refusing this application, we cannot possibly prejudice the proceedings on the trial for perjury. By pursuing the course we are asked to pursue, we might be doing injustice, and furnish an extremely dangerous precedent.

FAUCETT, J. I am entirely of the same opinion. When this application was first made, I was struck with this circumstance. Having a tolerably strong recollection of the course of such

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applications in England, I thought that it was, as his Honour has pointed out, an inverting of the order of things. If we were to grant this application, the result would be that we should be pronouncing an opinion against a person charged with perjury, having no knowledge of the facts of the case. I may say that I had long and anxious doubt as to the proper construction to be put upon s. 300 of the *Criminal Law Amendment Act*, and if it had not been for the clear expressions of opinions by the Court the other day, I should have declined to allow the proceedings to be instituted. But, having heard the opinions of the Court, I thought it my duty to grant the former application; though, in doing so, I took care that no act of mine should prejudice the accused. But to grant the present application for adjournment might possibly be most disastrous. Any defeated litigants might come and apply for a postponement on the ground that they intended to prosecute witnesses on the other side for perjury. The question is, which course is most conducive to the interests of justice. I must say that I think the Court could not stay the proceedings at the present stage without causing an impression that we thought there was some ground for the prosecution.

Innes J.

SIR G. INNES, J. I also think that this application must be refused. It is laid down in *Paley on Convictions* (5th Ed.) p. 81, as follows: "As a general rule, magistrates ought not to entertain criminal charges arising out of civil proceedings which are still pending, at all events, except for the purpose of holding the accused person to bail, unless the cause has been postponed to allow the criminal charge to be first disposed of." That statement of the learned author is supported by the case of *R. v. Ashburn* (2). Here the application is that we should postpone the civil proceedings in order that the criminal proceedings may be prosecuted. I think the authorities would not justify us in so doing; and I can see nothing in the circumstances of this particular case to take it out of the general rule. If the persons charged should be convicted, no doubt the Court will properly interfere, as in *Longworth v. Campbell* (1), to prevent any miscarriage of justice. But I think

it is more likely to conduce to the ends of justice, if we refuse this application. 1887.

Application dismissed with costs.

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[The new trial motion was then argued, and the Court reserved judgment.]

Attorneys for plaintiffs: *Want, Johnson & Co.*

Attorney for defendant: *W. T. Coonan.*

[NOTE.—See *Ex parte Cooper* (1 N.S.W. L.R. 143).]

Ex parte SHORTER.

March 1.

Interpleader—Small Debts Court—Deposition in support of claim need not be on affidavit—Small Debts Recovery Act 10 Vic. No. 10, s. 32—Practice of Court.

Darley C.J.
Faucett J.
and
Innes J.

By s. 32 of 10 Vic. No. 10, it is enacted that, in all interpleader claims, "such claim shall be deposed to before a Justice of the Peace, and in such deposition it shall be averred, &c."

Held, that a claim may "be deposed to" orally at the hearing.

The practice of the Small Debts Court, that such deposition could only be made on affidavit, being inconsistent with the Act, could not be upheld.

SHORTER was claimant in an interpleader suit which came on for hearing in the Small Debts Court at the Central Police Court. The plaintiff was sworn, and gave oral evidence in support of his claim. At the close of the claimant's case, the objection was taken by the attorney for the judgment creditor that no affidavit had been filed with the claim, in accordance with the constant practice of the Court. It was argued by the claimant's attorney, that an affidavit was not necessary, provided the claimant deposed to his claim on oath. The magistrate, Mr. *Maunsell*, S.M., decided that as it was the practice of the Court that an affidavit should be filed and that practice had not been complied with, he could not hear the case, and refused to adjudicate upon the claim.

Davies, for the claimant, in support of a rule *nisi* for a *mandamus*. The decision of the Court in this matter must turn

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upon the construction of s. 32 of the *Small Debts Recovery Act* (10 Vic. No. 10), which enacts, as to interpleader matters, that "if . . . such claim shall be deposed to before a Justice of the Peace, and in such deposition it shall be averred that the party in whose actual or ostensible possession such property as levied upon be found, is not the true owner, but the bailee thereof, such property shall be released from execution, &c. . . ." Here the claimant was sworn, and in the witness-box gave evidence of the facts required by this section to be averred "in such deposition." [He was stopped.]

Field, for the judgment creditor, showed cause. The deposition required by the Act must be in writing upon affidavit. At any rate, it has been the long established practice of the Court below that the notice of claim should be accompanied by an affidavit, and that practice, not being inconsistent with the provisions of the Act, this Court will not interfere. *Rez v. Justices of Monmouthshire* (1) shows that the Court will not interfere with the discretion of the magistrates if such discretion is exercised in furtherance of a reasonable practice. It is similarly laid down in *Burns' Justice of the Peace* (28th Ed.), vol. 1, p. 160, *sub tit.* "Appeal," that "the Court of King's Bench will not interfere with the established practice of the sessions, unless it appears to be manifestly wrong or unjust." And in support of that rule the above case and others are cited. The question is, whether the practice is reasonable. If the Legislature had intended to allow oral depositions, why are the words, "in such deposition it shall be averred," used in s. 32, when the words "upon oath" would have been sufficient.

Darley C.J. DARLEY, C.J. Everything that could be said, has been said by Mr. *Field*; but it appears to me that this matter is not open to argument. [His Honour read s. 32 of 10 Vic. No. 10.] That section requires a "deposition" in support of the claim. But it is contended that, though s. 32 does not provide for an affidavit, yet the deposition in support of the claim must be by an affidavit. I think there is nothing to support such an argument.

(1) 3 Dowl. 306.

It is enough if the claimant gives oral evidence to substantiate his claim.

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FAUCETT, J. I am of the same opinion.

Faucett J.

SIR G. INNES, J. I concur. It seems to me that the claimant here was complying with the Act. It is clear that the practice of the Court cannot be recognised where it conflicts with a statute. Section 32 shows that all that was required was done. The claimant goes into Court and deposes to his claim on oath, and that is all that the statute requires. I think the magistrate was wrong in refusing to adjudicate.

Innes J.

*Rule absolute. Costs to be paid by
judgment creditor.*

Attorneys for claimant: *Shorter & Mayhew.*

Attorney for judgment creditor: *C. Bull.*

PRESTON v. JONES.

March 7.

Evidence—Wrongful dismissal—Plea of payment into Court only—Evidence of misconduct not admissible in mitigation of damages.

Where a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would be a bar to the action is not admissible in mitigation of damages.

Thus, where in an action for wrongful dismissal, the defendant pleads only payment of money into Court, he cannot prove, in mitigation of damages, that he discharged the plaintiff for misconduct.

Darley C.J.
Faucett J.
and
Innes J.

NEW TRIAL MOTION. Action for wrongful dismissal, without notice, of plaintiff, employed under an agreement (declared upon) to work certain machinery for defendants, at wages of 4*l.* per week, with 10 per cent. of the net profits, one month's notice to be given "if the plaintiff should not carry out or attend to his work, or be guilty of any misconduct." Plea: Payment into Court, 24*l.* At the trial, before *Windeyer, J.*, evidence was

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admitted, after objection, to show that the plaintiff had misconducted himself, and was incompetent; but the jury found a verdict for plaintiff, with 112*l.* damages.

A rule *nisi* was granted on the grounds that the verdict was against evidence, and that the damages were excessive.

Wise for the defendants. The evidence showed that the plaintiff, who was engaged to work certain machinery, at the wages of 4*l.* per week and 10 per cent. on the net profits, was incompetent, and had misconducted himself by disobeying orders, absenting himself from his work, and getting drunk. This evidence having been admitted in mitigation of damages, the damages were clearly excessive.

Moriarty, for the plaintiff, showed cause. The evidence as to the plaintiff's incompetence and misconduct, which was objected to at the trial, was inadmissible. The case of *Speck v. Phillips* (1) is exactly in point. The verdict, so far from being against evidence, was found in spite of evidence which was wrongly admitted. Therefore, it cannot be said that the damages are excessive.

Wise, in reply. If *Speck v. Phillips* (1) had been cited at the trial, the Judge could have given leave to amend.

[DARLEY, C.J. I do not think so.]

We paid money into Court, as we had not given the month's notice agreed to.

[FAUCETT, J. You thought that would meet the breach of contract which you admit. The jury may have thought that you had no right to assess the damages yourself.]

The agreement, as set out in the declaration, provided that the defendants might give the plaintiff "one month's notice in writing, if the plaintiff should not properly carry out or attend to his work, or be guilty of any misconduct likely to militate against the successful working of the defendants' business." Were we precluded from giving evidence of misconduct? At any

rate, the Court will make the rule absolute on the terms that the defendants pay the costs; as, if we had pleaded so as to enable us to set up misconduct, we should have succeeded.

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DARLEY, C.J. I confess I do not understand how this evidence was admitted at the trial. On the pleadings, the only evidence admissible was that the plaintiff had not suffered damage beyond the amount paid into Court. This might have been shown, for instance, by proving that he could have obtained employment the day after his dismissal. It seems to me that the jury took a very proper view of the case. As to granting a new trial upon terms, we refuse, out of mercy to the defendants, to accede to that proposal. Darley C.J.

FAUCETT, J. (after recapitulating the facts), said: The defendants endeavoured to place themselves in the same position as they would have been in if they had not broken the contract. But it is clear that we must give the plaintiff more than the money paid into Court. Here the evidence goes to show that there was misconduct which, if pleaded and established, would have been a bar to an action; therefore, it was not admissible in mitigation of damages. So in an action of libel, if the only plea is not guilty, evidence cannot be given that the libel was true, and was published for the public benefit, because that defence must be specially pleaded; and such plea, if proved, would be an answer to the action; but truth alone cannot be pleaded at all; therefore, evidence of truth alone can be given in mitigation of damages. Faucett J.

SIR G. INNES, J. I quite concur. The only evidence which in this case could be admissible in mitigation of damages was that the plaintiff might have obtained other employment. An attempt was made here to get in evidence which would go in bar of the action. It is to be regretted that the case of *Speck v. Phillips* (1), which is exactly in point, was not brought before his Honour at the trial; if it had been, he would have rejected the evidence. Innes J.

Rule discharged with costs.

Attorney for plaintiff: *Sanders.*

Attorneys for defendant: *Slattery & Heydon.*

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In re GRIFFIN.

March 8 & 9. Evidence—Attorney and client, communications between—Privileged communication—Insolvency examination—Attorney acting for bill of sale holder as well as for insolvent.

Faucett J.
and
Innes J.

At an examination meeting in the insolvent estate of G., before the Chief Commissioner for Insolvent Estates, it appeared that S., who had been acting as G.'s attorney, had, as K.'s attorney, drawn a bill of sale from G. to K. One of the objects of the examination was to impeach this bill of sale as a preference. S., being asked the question, "Did G. state in the presence of K. that he (G.) was unable to meet his liabilities?" refused to answer on the ground that he was privileged as G.'s attorney.

Held, in accordance with the view of the Chief Commissioner, that S. was bound to answer the question. As K.'s attorney, he was not protected by any professional privilege, although he was G.'s attorney as well.

INSOLVENCY APPEAL.

Mr. W. T. A. Shorter, an attorney, had acted in his professional capacity for Griffin, an insolvent, and also for Kethel, for whom he had prepared a bill of sale from Griffin to Kethel. Shorter, being examined on behalf of the official assignee in Griffin's insolvent estate—one of the objects of the examination being to impeach the bill of sale—was asked the following question: "Did Mr. Griffin state, in the presence of Mr. Kethel, that he (Griffin) was unable to meet his liabilities?" Shorter declined to answer, but the Chief Commissioner ruled that he was compellable to answer the question. The examination meeting was then adjourned to enable Shorter to appeal to the Full Court on the point.

The ground of appeal was that the said question involved communications made between an attorney and his client in professional confidence, and in the course of legitimate professional employment, and therefore privileged from disclosure.

Pilcher, in support of the appeal. This question related to the state of Griffin's affairs, and Shorter, as his attorney, was privileged from answering it. In *R. v. Cox and Railton* (1) it was decided that, though the rule that communications between attorney and client are privileged is not an invariable rule, still

(1) 14 Q.B.D. 153.

ordinary communications between them in professional confidence are privileged so far as they are made in the legitimate course of the professional employment of the solicitor. The object of the question was to show that the bill of sale was prepared at a time when Griffin was really insolvent.

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[SIR G. INNES, J. The privilege is the client's privilege, and not the attorney's. Can the latter refuse to answer except under instructions from the insolvent?]

Shorter had been acting for Griffin; therefore, any communication of this kind was privileged. *Brett, M.R.*, in *Pearce v. Foster* (2), at p. 119, said: "The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away." [5 Vic. No. 17, ss. 67 & 69; 7 Vic. No. 19, s. 22; and 19 Vic. No. 33, s. 3 were referred to.]

Our. adv. vult.

On March 9th, the following judgments were delivered:—

March 9.

FAUCETT, J. Having read the evidence, I have formed a very different opinion to that which I arrived at yesterday on hearing the argument. I understood then that Mr. Shorter had been acting as attorney for Griffin when the conversation in question took place. But on reading the evidence I find this passage in Mr. Shorter's evidence: "I was acting for Mr. Kethel, and not for Mr. Griffin at all." Then at the end of the examination he was asked this question: "Did Mr. Griffin state in the presence of Mr. Kethel, that he (Griffin) was unable to meet his liabilities?"—and it was contended that this statement was privileged. It does appear that Griffin was a client of Mr. Shorter in other matters, but not in this matter. That being so, I cannot see the slightest ground for the protection of the attorney from being compelled to answer that question. But I will assume that Griffin was his client in this matter, and that Mr. Shorter was acting for Griffin. If he had been acting for Griffin alone, I should probably have come to the conclusion

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that the transaction was privileged, because I do not want to fritter away this privilege. But it appears that he was also acting as Kethel's attorney, and I cannot see why Kethel's attorney should be privileged. Kethel would have no privilege. Why, then, should Kethel's attorney be privileged, even though he was the attorney for Griffin as well? I think, therefore, that the Chief Commissioner was perfectly right in the view which he took.

Innes J.

SIR G. INNES, J. I concur. I fully agree that the professional privilege of attorneys should be preserved and not frittered away. In this case I think that Mr. Shorter was acting to a certain extent as for Griffin, the insolvent, and was also acting for Kethel, the bill of sale holder. Mr. Shorter says in his evidence, referring to that bill of sale, "I drew it for Mr. Kethel." The question then arises whether, at that interview, or at any other time, the insolvent said that he was not able to meet his liabilities. The object of the proceeding in insolvency was, as I understand, to set aside this bill of sale as being a preference. We have to look at the question whether there is any privilege at all in this matter. If there was any fraud—and I do not say that it was in the mind of Mr. Shorter—the privilege would be destroyed. It was so laid down by *Stephen, J.*, who delivered the judgment of the Court in *R. v. Cox and Railton* (1) at p. 165. It would be otherwise if there were no question of intended fraud, and the transaction between the grantor and grantee were in good faith. Besides, was the statement confidential at all? It seems to me that, if a statement is made in the presence of a third party, there can be no privilege properly so called. The only privileged communications are those made between the solicitor and client when they are alone.

Appeal dismissed.

In re JANET S. WHITE.

1887.

Crown Lands Act of 1884 (48 Vic. No. 18), s. 125—Death of applicant—Adjournment by land board pending administration.

March 9.

Darley C.J.
Faucett J.
and
Innes J.

W., an applicant to convert a pre-lease into a conditional lease, under 48 Vic. No. 18, died before the application came before the local land board. After one adjournment for evidence of the deceased having any legal representative, the board refused a further adjournment, although evidence was given that one H. was applying for letters of administration, and disallowed the application.

Held, that the board were wrong in not acceding to the request for a further adjournment. Decision reversed.

SPECIAL case stated by the Minister for Lands, under the 140th section of the *Crown Lands Act* of 1884 (48 Vic. No. 18).

1. On 23rd of June, 1881, Janet Smith White became the conditional purchaser of 140 acres of land.

2. On the 10th March, 1885, the said Janet Smith White, being still the owner of the said purchase and residing thereon, applied for a conditional lease of 1920 acres, under the 54th section of the *Crown Lands Act* of 1884, in virtue of the said conditional purchase.

3. The said application was duly made, and there was Crown land available for the purpose of the application.

4. On the 17th of May, 1885, the said Janet Smith White died before the said application had come before the local land board, at Moree, to be dealt with.

5. On the 25th of October, 1885, the application came before the said board, and was adjourned for evidence as to the deceased having any legal representatives; and on the 22nd March, 1886, the matter again came before the said board, when evidence was given that Mrs. Hassall, niece of the said Janet Smith White, had applied for letters of administration, which application was still pending. A further adjournment was refused.

6. The board held that as there was then no legal representative to perform the condition of residence, the application must be dismissed.

7. Against this decision T. H. Hassall, husband of the said Mrs. Hassall, appealed to the Minister, who referred the question to the Supreme Court.

1887. *The appellant* in person. The application was to convert into a conditional lease a pre-lease which the deceased had held since 1881.

In re
WHITE.

O. B. Stephen (Salomons, Q.C., with him) for the Crown. He referred to s. 125 of 48 Vic. No. 18, the *Crown Lands Act* of 1884, as to the rights of personal representatives.

Darley C.J. DARLEY, C.J. (after stating the facts) continued: I am of opinion that the decision of the land board of the 22nd March was erroneous. I think that they ought not then to have decided the matter; but to have granted a reasonable adjournment, to see whether or not this application for letters of administration would be granted. I think the decision was erroneous, and ought to be reversed, so that the case may be heard upon its merits by the land board.

Faucett J. FAUCETT, J. I am of the same opinion. The death of Mrs. White did not destroy the right of her personal representative to continue to perform the conditions. That seems to me to have been the mistake they made. I entirely concur with his Honour in thinking that, when they were told that a particular person was seeking to obtain letters of administration, the board ought to have held their hands and to have adjourned the hearing until these letters had been obtained, and then have decided the case on its merits.

Innes J. SIR G. INNES, J. I only regret that we cannot decide the matter finally.

Appeal allowed. Decision reversed.

March 9.

SLOCOMBE v. HENDERSON.

Darley C.J. District Court appeal—*Motion in Chambers*—*Adjourned hearing must be before the same Judge*—44 Vic. No. 30, s. 1—*Time for moving*—*Costs of married woman on taxation.*

Faucett J.
and
Innes J.

Under 44 Vic. No. 30, s. 1, which gives an appeal by motion from the decision of a District Court to the Supreme Court, and enacts that when the Supreme Court is not sitting in Banco, "such motion may be made before any Judge thereof;" where a Judge in Chambers has partly heard and adjourned such

motion, no other Judge has jurisdiction to hear such adjourned application. So, where a motion was made in time and adjourned for the Judge's notes to be procured, and afterwards, after the eight days had expired, was resumed before another Judge, it was held to be a fresh motion, and therefore out of time.

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Special order as to costs of married woman.

DISTRICT COURT APPEAL.

Cohen for the plaintiff (appellant).

Gordon, for the defendant (respondent), took the preliminary objection that the rule *nisi* had been obtained out of time. The decision below was on November 26th, 1886. On December 4th an application was made to Sir G. Innes, J., in Chambers (there being no Court sitting in Banco), and adjourned, the Judge's notes not having been obtained. The rule was subsequently granted by his Honour the *Chief Justice*, after the eight days required by 44 Vic. No. 30, s. 1, had expired. The rule does not recite any adjournment. Even if it did, this objection would be fatal; for, by the Act (44 Vic. No. 30), s. 1, jurisdiction to hear appeals, when the Court is not sitting in Banco, is given to "any Judge thereof." The motion in this case having been part heard before Sir G. Innes, J., could not be resumed before another Judge.

Cohen. Although different Judges may sit in Chambers on Monday, Wednesday, and Friday, the Court is one and the same tribunal. It is the same Court, though it may be differently constituted. In *Button v. Woolwich Building Society* (1), a similar motion was made in Chambers before one Judge, who adjourned the application, which was renewed before another Judge, who adjourned it to the Divisional Court. The point on which the case turned was whether the latter Judge had power to send the case to the Court. The present point was not taken. So in *Tennant v. Rawlings* (2), where the objection taken was that there was no power to extend the time fixed by the Act for hearing motions *nisi* in County Court appeals, the point was not taken that the different applications had been made to different Judges.

(1) 5 Q.B.D. 88.

(2) 4 C.P.D. 133.

1887. [DARLEY, C.J. The Court in Chambers is the same, whatever
 SLOCOMBE Judge is sitting. But the question is whether a matter of this
 v. kind is not one of which the particular Judge to whom the
 HENDERSON. original application is made is personally seized.]

The words of our Act mean that the motion may be made before any Judge in Chambers, whoever may happen to be sitting.

[DARLEY, C.J. The words of the Act are, "If, pending such eight days, or at the time of their expiration, the Court shall not be sitting in Banco, such motion may be made to any Judge thereof." This is determined by statute. We cannot vary a statute, as we could a mere rule of Court. What are the words of the English Act?]

"If the Court . . . be not sitting, such motion may be made before any Judge of a superior Court sitting in Chambers." In *Button v. The Woolwich Building Society* (1), the matter came before *Bowen, J.*; and then before *Lindley, J.*, in Chambers.

[SIR G. INNES, J. That would be in your favour if the words of our Act were "or to any Judge thereof in Chambers."]

The words "in Chambers" follow by necessary implication. *Button v. The Woolwich Building Society* (1) seems to be the exact converse of *Blakeney v. Pegus* (3).

[FAUCETT, J. A clear distinction is drawn in *Brown v. Shaw* (4) by *Bramwell, B.*, between rules for the regulation of the business of the Court and matters regulated by statute. At p. 427 he says: "The Practice Rules were made by the Judges, and can hardly be deemed to have the force of an Act of Parliament; but I doubt whether, under any circumstances, we have power to enlarge a period of time fixed by a statute for doing an act."]

[DARLEY, C.J. Was it not in point of fact an entirely new application to me?]

Suppose this case is adjourned by the present Court, it could be heard by a Court differently constituted.

[DARLEY, C.J. Yes; but it is one and the same Court.]

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DARLEY, C.J. I very much regret having to give effect to this technical objection, which, however, was very properly taken by Mr. Gordon. In *Blakeney v. Pegus* (3), the facts were not precisely the same. It was there held that the Court had no power to partly hear a motion of this kind, and then send it before a Judge in Chambers. Sir J. Martin, C.J., says at p. 109: "The Court here has statutory power; but the express directions of the statute conferring the power must be obeyed." And again, at the bottom of the same page, he says: "Then comes this question, whether, where a motion is partly argued before the Full Court, it can be continued before a Judge in Chambers. It is true that the Court may direct that the motion may be heard altogether in Chambers. But here the motion was made to the Court; it must, therefore, be considered, by a necessary fiction, as partly heard, in order to comply with the provisions of the statute. There is no authority, of which I am aware, by which the Court can partly hear, and then send a case to a Judge in Chambers. If it were not partly heard, it must have come before the Judge in Chambers as a new motion." Apply that reasoning to the present case. It came before a Judge of the Court, and was part heard before that Judge. It seems to me, therefore, following the reasoning of Sir J. Martin, that it must be heard in all its stages before that Judge. That Judge had no power to delegate his power to another Judge. If an application of this kind is heard before one Judge, it must be continued before that Judge. It may be unsatisfactory; but that is a matter for the Legislature, and not for this Court, to rectify.

FAUCETT, J. I am sorry that I also feel compelled to uphold this preliminary objection. A person comes within the eight days required by the Act, but has been unable to get a copy of the Judge's notes; and, as we cannot deal with the matter, we partly hear it and adjourn it to a subsequent day. That is not, in fact, to repeal the rule as to eight days. Two arguments were addressed to us by Mr. Cohen. First, that the Supreme Court

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may be differently constituted from day to day ; but, like the Crown, which we know never dies, so the Court always continues, no matter what Judges constitute it. Secondly, that a Judge sitting in Chambers is, for the purposes of these appeals, when the Court is not sitting in Banco, a Judge of the Court, acting for the Court under the statute ; and, therefore, any Judge so sitting in Chambers can hear any such appeal. If so, that would get rid of all the difficulties. If the practice were only prescribed by a rule of Court, it would be a different thing ; because, as it has been frequently said, the rules are not the masters of the Court, but the slaves of the Court. But we cannot in that way get rid of an enactment in an Act of Parliament.

Innes J. **SIR G. INNES, J.** When I first saw the indorsement on the papers, that the rule had been first moved before me, and afterwards granted by his Honour the *Chief Justice*, I thought it probable that this objection might be taken. I regret that we must give effect to it, because a substantial miscarriage of justice may be the result. The words of the Act are not "before a Judge in Chambers," but "before any Judge thereof." The tribunal so appointed being "any Judge" of the Supreme Court, that Judge to whom the application is first made can alone deal with the matter. At the same time we cannot interfere in any way with Mr. *Cohen* proceeding with his application before me, if he thinks it advisable to do so.

Gordon asks for costs.

Cohen submits that, under the circumstances, no costs should be allowed.

Darley C.J. **DARLEY, C.J.** I am afraid this rule must be discharged with costs. It is not a purely technical objection, but an objection to our jurisdiction.

Gordon asks for an order directing the Prothonotary that, on the taxation of the costs of this rule, the costs of the defendant be allowed on the usual scale. There is this difficulty, that the defendant, being a married woman, cannot appear by an

attorney to tax costs, although the defence, upon which she succeeded below, was coverture.

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DARLEY, C.J. I think that as the Prothonotary is our officer we can make the order (*a*).

Order accordingly. Rule discharged with costs.

Attorney for plaintiff (appellant): *Lyons*.

Attorney for defendant: *Rofe*.

(*a*) NOTE. On May 10th, *Cohen*, for the plaintiff, asked the Court for an expression of opinion, for the direction of the Prothonotary, as to the meaning of the order of 9th March as to costs. He referred to *Finlay v. Farquharson* (3 C.B. 347). The Prothonotary was in doubt whether to allow costs out of pocket only, or ordinary costs, as between party and party.

DARLEY, C.J. The meaning of what we said was that we could not assess the costs, as we had no time. We therefore sent the matter to our officer, the Prothonotary, to assess the costs. We intended that the defendant should have the ordinary costs as between party and party.

SIR G. INNES, J. It would be hard on the respondent, whose defence was coverture, and who is brought here by the appellant, to deny her costs. She is clearly entitled to costs as between party and party.

LEE v. BLAKENEY.

March 9.

Landlord and tenant—Ejectment—Common Law Procedure Act, 1853, s. 165—
Mesne profits—Special damage.

Darley C.J.
Faucett J.
and
Innes J.

In ejectment under s. 165 of the *Common Law Procedure Act*, 1853, a plaintiff is entitled to recover as mesne profits the rent he might have obtained but for the defendant's holding over, together with interest on a sum offered as a bonus for the good-will of the premises. But he is not entitled to recover special damages for the loss occasioned by his being unable to enter into such contract.

EJECTMENT under s. 165 of the *Criminal Law Procedure Act*, 1853 (1), by landlord of premises occupied as an hotel, held over

(1) *Common Law Procedure Act*, 1853, with due notice of trial, the Judge, s. 165: "Whenever it shall appear on before whom such cause shall come on to the trial of any ejectment at the suit of be tried, shall, whether the defendant a landlord against a tenant, that such shall appear upon such trial or not, tenant or his attorney hath been served permit the claimant on the trial, after

1887. for 24 weeks after the expiration of a lease. At the trial on the
 LEE 6th September, 1886, before *Windeyer, J.*, it was proved by the
 v. plaintiff that there were counterpart leases of the premises, dated
 BLAKENY. 24th March, 1881; that the lease expired, according to the copy kept by him, on 24th March, 1886, but by some mistake, according to the copy kept by the tenant, on March 7th; the rent was 3*l.* 3*s.* per week; the defendant paid fortnightly; the last payments were made on the 8th and 22nd March, 1886. In January, 1886, the defendant spoke to the plaintiff about renewing the lease, and the plaintiff told him that he was going to advertise for tenders. The defendant asked for time, and the plaintiff consented to give him a month. The plaintiff accepted a tender for 3*l.* 10*s.* a week, and 700*l.* bonus, for a seven years' lease. The defendant refused to quit; proceedings were instituted by the plaintiff in the Police Court, and ultimately this action was commenced. Darby Ruane, a publican, said that in March, 1886, he tendered, and was willing to give 700*l.* bonus, and 3*l.* 10*s.* a week for a seven years' lease of the hotel; and that he was introduced to the defendant as the in-coming tenant. Denis Courtney, a publican, said he also tendered: The place was worth 3*l.* 10*s.* or 3*l.* 15*s.* a week, and 600*l.* or 700*l.* bonus on a lease from seven to ten years.

The defence was that the lease having expired on the 7th March, 1886, and the plaintiff having accepted rent on two occasions after that, a fresh tenancy for a year had been created. The defendant admitted that the plaintiff had told him he was

proof of his right to recover the possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause or to some preceding day to be specially mentioned therein, and the jury on the trial finding for the claimant, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and

also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury. Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment."

going to call for tenders, and that he would give the defendant the preference.

The jury returned the following verdict in writing :—Verdict for the plaintiff. Damages, 340*l.*; 24 weeks' rent at 75*s.*, 90*l.*; interest on contract bonus of 700*l.*, 50*l.*; loss through non-fulfilment of contract with Ruane or Courtney, 200*l.* Making 340*l.*

A rule *nisi* for a new trial was granted on the following grounds :—1. That the damages and mesne profits awarded to the plaintiff were excessive. 2. That his Honour was wrong in directing the jury to assess damages in this action on contracts and agreements, of whose conditions and terms there was no evidence. 3. That his Honour was wrong in allowing and directing the jury to assess damages to the plaintiff on contract and agreements with third parties, of whose capacity to perform them there was no evidence, and where such damages were not specially laid in the action. 4. That his Honour was wrong in allowing and directing the jury to assess damages on contracts and agreements with third parties where there was no evidence that their contents and effect had been communicated to the defendant by the plaintiff, or were otherwise known to him.

Moriarty, for the defendant, in support of the rule, contended that the plaintiff ought to have alleged special damage.

[*DARLEY*, C.J. The difficulty is, that in ejectment special damage cannot be claimed. In ejectment on title, a plaintiff is not entitled to mesne profits; he must afterwards bring trespass to recover mesne profits. The question is, whether, under s. 165 of the *Common Law Procedure Act*, special damage, as it cannot be specially alleged, can be recovered. The real point is, as to the meaning of the words "mesne profits" in that section.]

There was no evidence of any contract having been actually made. What Ruane said was, that 3*l.* 10*s.* would be a good rent, and that he would not give the 700*l.* bonus except on terms that he could sub-let. The plaintiff always refused to allow his tenants leave to sub-let. Therefore, the verdict was wrong as to those items.

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[DARLEY, C.J. I think if the plaintiff had gone into the box and said, "I could have got 3*l.* 15*s.* a week, and 700*l.* bonus, but I did not try because the defendant was holding over," that would have been enough to justify the verdict as to those items.]

As to the item of 200*l.*—[He was stopped.]

Mann, for the plaintiff, showing cause, was asked by the Court to confine himself to the item of 200*l.* He cited *Holdfast v. Morris* (2), *Goodtitle v. Tombs* (3).

[DARLEY, C.J. These cases would have applied if you had taken other proceedings.]

In s. 165 of the *Common Law Procedure Act*, it is enacted that "the jury on the trial finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also to the amount of the damages to be paid for mesne profits."

[DARLEY, C.J. "Mesne profits" does not include special damage. Even in an action for mesne profits you can only get special damages when they are specially claimed.]

But it is submitted that under the wide terms of this section the jury were entitled to give the 200*l.* for "damages."

Darley C.J. DARLEY, C.J. This matter appears to me almost too clear for argument. It is an action by a landlord against a tenant under the *Common Law Procedure Act*, 1853, for overholding certain premises. By s. 165 of that Act, "the Judge . . . shall permit the claimant on the trial . . . to go into evidence of the mesne profits . . . and the jury on the trial finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the premises, and also as to the amount of the damages to be paid for such mesne profits." But there is a proviso that nothing in the section shall bar the landlord's right to bring an action for mesne profits and so recover damages

which he could not recover in ejectment. In this case, the landlord having elected to proceed under that section, gave evidence of what the mesne profits were that were due to him from the date of the expiration of the tenant's interest, up to the time of trial. The jury found that he was entitled, altogether, to 340*l.* The first item which they allowed was 90*l.* for 24 weeks' rent, at 3*l.* 15*s.* a week. It was proved that that was what the place would have let for. The plaintiff also gave evidence of certain tenders which he had had for the place, and that he might have obtained a bonus of 700*l.* for a seven years' lease; as to that, the jury gave him 50*l.* as interest. As to these two items of 90*l.* and 50*l.*, I am of opinion that they were mesne profits within the meaning of this section.

Now comes the third item of 200*l.*, as to which Mr. *Mann* has failed to convince the Court that the plaintiff was entitled to that sum in a proceeding under this section. Evidence was given of certain contracts which the plaintiff entered into, but was unable to complete owing to the defendant's conduct in holding over the premises. I am of opinion that such evidence could not be given in this action. If he wanted to get special damage he should have brought his action for mesne profits. If that were not so the most manifest injustice might be done. Therefore I am of opinion that the verdict should be reduced by the 200*l.* improperly given as special damage; but I think the verdict ought to stand as to the other two items.

FAUCETT, J. Formerly a separate action for mesne profits was necessary. In such action he might have been entitled to recover special damage, such as damages for loss of a contract, if he had given notice. Now, under the *Common Law Procedure Act*, to a certain extent these two actions have been combined; so that ejectment is considered not only as an action for the recovery of land, but also for the recovery of mesne profits. Mesne profits, as it seems to me, are such damages as a plaintiff would be entitled to recover in an action for use and occupation. It depends on the circumstances whether the jury will take the rent as a guide or not. They may give more; they

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may give less. He is entitled to mesne profits, *i.e.*, such profits as he has lost by the holding-over complained of.

As to the amount of the first item, there was evidence that the landlord might have got 3*l.* 15*s.* a week on an agreement for a lease for seven years, and, in addition, a bonus of 700*l.* The jury gave 90*l.* for the loss of this rent, and they seem to have taken that 700*l.* into consideration, and to have given 50*l.*, which they called interest, on the sum. It seems to me that that was a fair thing for the jury to take into consideration. We may find, if we examine it, that the calculation was not exactly accurate; but we are not obliged to look at such calculations with microscopic eyes.

As to the last item, I am clearly of opinion that in this particular form of action, notice not having been given, these damages could not be claimed. But it also seems to me that it was not in the contemplation of the parties that such damages could be given. It seems very probable that the plaintiff could not recover them in any form of action; but on that point I express no opinion.

SIR G. INNES, J. I entirely concur.

The plaintiff consenting to the reduction of damages, the rule was discharged without costs.

Attorneys for plaintiff: *R. B. Smith & Smith.*

Attorney for defendant: *Sanders.*

March 10.

JOHNSTON v. PRESTON.

Pleading—Separate condition in agreement—Cross-action.

Faucett J.
and
Innes J.

To a declaration on an agreement for the supply of 2000 tins of boiled beef, alleging that it was a term of the agreement that the defendant should make good all loss sustained by the plaintiff through blown tins on the receipt of survey reports, and claiming damages for the loss sustained by reason of a

number of the tins being blown; the defendant pleaded, thirdly, that under the agreement the plaintiff was bound to furnish to the defendant, within a reasonable time, the survey report, and did not furnish the same; and, fourthly, that it was a term of the agreement that the defendant should, on the receipt of the survey report, have the option of having the blown tins returned to him on payment of freight, &c., but the plaintiff, though duly notified, refused to return the blown tins to the defendant.

Held, that the pleas were bad, as the said conditions were not conditions precedent to the plaintiff's right of action, but ought to be pleaded by way of cross action. Leave to amend accordingly.

DECLARATION: For that it was agreed by and between the plaintiff and the defendant that the defendant should supply to the plaintiff 2000 cases of boiled beef preserved in tins, and that the plaintiff should pay for the same a certain price then agreed upon between them, and that the defendant should make good all loss which might be sustained by the plaintiff through blown tins on receipt of survey reports; and the plaintiff says that he did sustain great loss through blown tins within the meaning of the said agreement. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter alleged; yet the defendant has not made good the said loss, and a large sum remains due from the defendant to the plaintiff in respect thereof.

2. And the plaintiff further sues the defendant for that the plaintiff was desirous of purchasing from the defendant a quantity of meat preserved in tins for shipment from Sydney to England, as the defendant well knew, and thereupon it was agreed by and between the plaintiff and the defendant that the defendant should supply to the plaintiff 2000 cases of boiled beef preserved in tins, and that the plaintiff should pay for the same a certain price agreed upon between them, and that the said meat should be properly preserved, and should be packed in tins properly soldered and reasonably strong enough and fit for the said voyage from Sydney to England aforesaid, and the plaintiff accordingly bought the said meat and shipped the same from Sydney to England, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to sue for the breaches hereinafter alleged, yet the said meat was not properly preserved, and was not packed in tins

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properly soldered, and the said tins were not reasonably strong enough and fit for the voyage from Sydney to England aforesaid, whereby a quantity of the said tins broke and burst and became damaged and injured, and a quantity of the said meat went bad and became of no use to the plaintiff. And the plaintiff lost the benefit of the said agreement and the money which he paid to the defendant for the said meat, and the profits he would have made thereby, and incurred loss and expense in shipping the said meat to England, and for the freight, storage, cartage, survey fees and other charges. And the plaintiff claims six hundred and fifty pounds.

PLEAS: 3. And for a further plea to the said first and second counts respectively the defendant says that under the said agreement it became the duty of the plaintiff to furnish to the defendant within a reasonable time the survey report in the said agreement referred to. And the defendant says that the plaintiff did not furnish to him the said survey report within a reasonable time. 4. And for a further plea to the said first and second counts respectively, the defendant says that it was one of the terms of the said agreement that in the event of any of the said tins becoming blown within the meaning of the said agreement the defendant on the receipt of the said survey report thereof should have the option of having the said blown tins returned to him by the plaintiff, and that the defendant should bear and pay the freight and shipping charges on the said tins so returned to him. And the defendant says that in accordance with the said agreement he duly notified to the plaintiff that he required the alleged blown tins to be returned to him on the terms of the said agreement, but the plaintiff refused to return the said tins to the defendant.

Demurrer to the third plea, upon the grounds:—1. That the said plea contains no legal defence to the causes of action to which it is pleaded. 2. That the alleged omission to furnish the survey reports might support a plea of cross-action in respect of any damage arising from such omission, but is not a breach of a condition precedent to plaintiff's right of action. 3. That the alleged duty does not arise in respect of the agreement declared upon in the second count.

Demurrer to the fourth plea, upon the grounds :—1. That the said plea contains no legal defence to the causes of action to which it is pleaded. 2. That the alleged omission to return the said tins might support a plea of cross-action in respect of any damage arising from such omission, but is not a breach of a condition precedent to plaintiff's right of action. 3. That the said plea is no answer to so much of the second count as complains of injuries and damage to tins other than blown tins.

Joinder in demurrer.

O. B. Stephen, for the plaintiff, in support of the demurrer.

Donovan, for the defendant, in support of the pleas, was called upon by the Court. He contended that the terms of the agreement giving the defendant, after the receipt by him of the report of survey of the tins, the option of having the blown tins returned to him, implied that such report must be furnished by the plaintiff within a reasonable time. The object of giving the defendant that option was to enable him to recoup himself to some extent for the damage which he might have to pay the plaintiff for loss through blown tins. This object would be entirely defeated by the plaintiff's delay in having a survey made after the landing of the tins in England ; and, further, by plaintiff's refusal to return the blown tins to defendant when notified to do so. Defendant's liability to pay to plaintiff the loss sustained by him through blown tins depended upon the fulfilment by plaintiff of the obligations thus imposed on him. The performance by the plaintiff of the duties thus imposed on him was, therefore, in each case a condition precedent to the plaintiff's right of action.

FAUCETT, J. (after reading the material parts of the pleadings). It is contended by *Dr. Donovan* that these are conditions precedent to the right of action by the plaintiff. According to that, the plaintiff is entitled to damages at once for the blown tins ; and he is entitled to full damages for the loss of the tins. How can the non-furnishing of a report be an answer to the whole cause of action ? There may be no damage occasioned by the non-furnishing of the report. It might be a ground for reducing

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1887. the damages ; but it seems to me that is rather a matter for a
 JOHNSTON plea of cross-action. It is not an answer to the action ; it is not
 PENSTON. a condition precedent to the plaintiff's claim, but a ground of
 Faucett J. damages to be set off against the plaintiff's claim. The fourth
 plea is substantially the same as the third. The legal principle
 is clear where there is a separate condition, and one which is in
 no way a condition precedent to the plaintiff's claim. Under
 these circumstances, I am of opinion that the pleas are bad. But
 they can be amended, so as to be made pleas by way of cross-
 action.

SIR G. INNES, J. I am of the same opinion, for the reasons
 so clearly stated by his Honour.

*Judgment for the plaintiff, with
 liberty to the defendant to amend
 his pleas, by making them pleas
 of cross-action.*

Attorneys for the plaintiff: *Stephen, Laurence & Jaques.*

Attorneys for the defendant: *Jones & Jones.*

May 4.

CLEMENT v. DECENT.

Darley C.J.
 and
 Innes J.

*District Court appeal—District Courts Act (22 Vic. No. 18), s. 94—Security—
 Verdict for defendant—Attachment of debt equal to amount of taxed costs—
 Right to have full security given.*

A District Court appeal will be struck out with costs if the security required
 by s. 94 of the District Courts Act (22 Vic. No. 18) has not been perfected.

Where the appellant (plaintiff) had given security in the amount of 30l., and
 claimed to be exonerated from giving any further security, inasmuch as the
 respondent had attached debts in the hands of a creditor of the plaintiff suffi-
 cient to cover the amount of the taxed costs,

Held, that although the respondent had a right to attach the money, he was
 also entitled to have the full security given in accordance with s. 94.

DISTRICT COURT APPEAL.

Cohen, for respondent (defendant), took the preliminary
 objection that the security required by the *District Courts Act*

(s. 94) had not been given. The verdict below was for the defendant; and the costs had been taxed at 29l. The plaintiff had only lodged 30l. with the Prothonotary the previous afternoon, after the attention of the Court had been called to the fact that no security at all had been given.

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Field, for the plaintiff (appellant), submitted that the plaintiff need not lodge more than the 30l., as the defendant had attached a debt, in the hands of a creditor of the plaintiff, sufficient to cover the amount of the judgment. To require him to pay the 29l. would be virtually to make him give double security. If it were necessary, then, as in *Bogan v. The Borough of Newtown* (1), the case should be adjourned, in order to enable the plaintiff to pay the additional amount. As to the time when the 30l. was lodged, no objection can be taken to that. It was expressly decided in *Stephen v. Taylor* (2), following *Boggs v. Hickie* (3), that the security might be given at any time. In any case the appeal, if now dismissed, can be reinstated when the security is perfected: *Boggs v. Hickie* (3).

The CHIEF JUSTICE. The practice was settled as far back as 1863, and has in effect been followed in the cases to which we have been referred; and, according to that practice, this appeal must be struck out with costs. As there is no rule fixing the time within which security is to be given, it would appear that it can be given at any time; and all that the plaintiff, the appellant in this case, had to do was to give the security required by s. 94. When the case of *Boggs v. Hickie* (3) came on, it appeared that no security had been given, and accordingly the appeal was struck out with costs. On a subsequent date, the security having in the meantime been perfected, the appeal was heard on its merits.

In the District Court rules no time is fixed for giving security, and I think the matter ought to be called to the attention of the District Court Judges (4). By s. 94 of the District Courts Act, the

(1) 2 N.S.W. Weekly Notes, 91.

(3) 2 S.C.R. 211

(2) 2 N.S.W. Weekly Notes, 87.

(4) See new Rule of 13th Aug., 1887

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Then it is said that the defendant has attached moneys owing to the plaintiff to cover the amount of the costs below, which were taxed at 29*l.* He has a perfect right to do that, and it does not in any way interfere with his right to have the security perfected in accordance with the Act.

SIR G. INNES, J. I concur. I have very little to add. It is simply to express my concurrence in the suggestion that the District Court Judges should amend their rules. I entirely concur with his Honour as to the other point, that the fact of the attachment makes no difference. We follow the practice in *Boggs v. Hickie* (3), and strike out the case on the ground that the security has not been perfected.

Cohen asks the Court to fix the time within which the security is to be given.

THE CHIEF JUSTICE. We have no power to fix the time. No time is fixed by the Act (4).

Appeal struck out with costs.

Attorney for plaintiff: *Lander*.

Attorney for defendant: *W. T. A. Shorter*.

DUFFY v. DE ROZZOLI.

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District Court—Jurisdiction.

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Darley C.J.
and
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An action will lie in the District Court on a judgment recovered in the Supreme Court.

PROHIBITION.

Plaint to recover the sum of 35*l.* 10*s.* 2*d.* for money payable by the defendant to the plaintiff, for that the plaintiff on the 3rd day of February, 1887, in the Supreme Court of New South Wales, by the judgment of the said Court, recovered against the defendant 29*l.* 11*s.* 2*d.*, together with 5*l.* 19*s.* costs of suit, which said judgment is still in force and unsatisfied. With the copy-plaint, a summons under 48 Vic. No. 7, s. 1, was served upon the defendant, who at once applied for a rule *nisi* for a prohibition, which was granted on the ground that the action would not lie.

Davies, for the defendant, in support of the rule. An action will not lie in the Supreme Court on a judgment recovered in a District Court: *Greville v. Bird* (1); nor on a judgment or adjudication by justices in Petty Sessions: *Simpson v. Rodd* (2). Applying these cases by analogy, it is submitted that this action is not maintainable, on the principle that no action will lie where a person having recovered a judgment in one Court, seeks, by bringing an action on that judgment in another, to avail himself of other and different remedies to those afforded by the original Court of his choice. This is the gist of the decision in *Berkeley v. Elderkin* (3), followed by the cases cited above.

[SIR. G. INNES, J. Is not the reason of those cases that certain favours are bestowed on the defendant, and that, therefore, the plaintiff cannot go to a Court of unlimited jurisdiction?]

Here the plaintiff is suing in the District Court in order to obtain the additional remedy of *ca. sa.*, given by sec. 87 of the *District Courts Act*. There are four grounds on which a *ca. sa.*

(1) 6 S. C. R. 253.

(2) 6 S. C. R. 1.

(3) 1 Ex. B. 805; 22 L.J. Q.B. 281.

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may issue out of the District Court (22 Vic. No. 18, sec. 27), but only two in the Supreme Court (10 Vic. No. 7, sec. 3; *Pilch*. par. 1257). If this action will lie, the plaintiff acquires a remedy which he has not in the tribunal in which he deliberately chose to bring his original action, and the defendant loses a privilege conferred on him by the Legislature, viz.: of the protection from the liability of having a writ of *ca. sa.* issued against him on the third ground given by the *District Courts Act*, within the principle contained in the latter part of the judgment of *Stephen*, C.J., in *Greville v. Bird* (1).

[SIR G. INNES, J. It seems strange that the remedies should be wider in a Court of lower jurisdiction, which is a mere creature of statute.]

[The CHIEF JUSTICE. It is simply this, that the common law right to issue a *ca. sa.* has been limited by statute.]

To decide against me would be in effect to repeal that statute. In England, by the *County Courts Act* (19 and 20 Vic., c. 108), sec. 27, an action cannot be brought in a County Court on any judgment of a superior Court.

[The CHIEF JUSTICE. Is not that against you? If such legislation was necessary, it was because the law was the other way.]

No. I submit that in deciding this point the Court will be guided by the action of the Imperial Legislature.

[The CHIEF JUSTICE. You must show that the Act is declaratory.]

Suppose an action is brought in the Supreme Court for trespass to land in which a question of title arises, and the plaintiff obtains a verdict and judgment. Can he bring an action on that judgment in the District Court, which the Legislature has expressly declared shall have no jurisdiction where title to land is in dispute?

[The CHIEF JUSTICE. Why not? The Supreme Court judgment becomes a debt, and the action in the District Court would

be on the debt. The proper plea would be *nunquam indebitatus*, or *nul tiel record*.] 1887.

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Then, by parity of reasoning, the judgments sued on in *Greville v. Bird* (1) and *Simpson v. Rodd* (2) became mere debts, and yet in those cases it was held that no action would lie upon the judgments. [*Jones v. Jenner* (4); *Carpenter v. Thornton* (5); *Henderson v. Henderson* (6) were also referred to.]

Besides, to make use of the Supreme Court for the sole purpose of obtaining remedies only available to the District Court, would be making use of the former in a manner derogatory to its dignity. Lastly, on the ground of expediency, there would be nothing to prevent a plaintiff from wantonly causing annoyance and expense to the defendant, by issuing a District Court summons as soon as he recovered judgment in the Supreme Court; process might issue from both Courts at once, and the clash of jurisdiction would be most undesirable. Therefore, both on the principle laid down in the cases cited, and on the ground of expediency, a plaintiff in such an action as this will be compelled to abide by the ample remedies afforded him by the Court of his choice.

Field, for the respondent (plaintiff), cited *Winsor v. Dunford* (7), and was stopped by the Court.

The CHIEF JUSTICE. Section 7 of the *District Courts Act* (22 Vic. No. 18) provides that "all pleas of personal actions, wherein the amount claimed is not more than 200*l*. . . . may be holden in the Courts established under this Act" And then there are certain exceptions, of which this action on a Supreme Court judgment is not one. The case of *Winsor v. Dunford* (7) is a distinct authority that this action is maintainable. Since that case the Act 19 and 20 Vic., c. 108 (the *English County Courts Act*), was passed, in which it is expressly provided by sec. 28, that "no action shall be brought in a County Court on the judgment of a superior Court." Perhaps it would be well if we had such a provision here; I think it probable that

(4) 25 L.J. Ex. 319; 2 Jur. N.S. 574.

(6) 6 Q. B. 238.

(5) 3 B. and Ald. 52.

(7) 12 Q. B. 603; 18 L. J. Q. B. 14-

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the provision in the English *County Courts Act* was passed in consequence of the decision in *Winsor v. Dunford* (7). But until we have some such Act that decision must govern our procedure. With respect to *Simpson v. Rodd* (2), and *Greville v. Bird* (1), I do not gather that the Court held that they had no jurisdiction to try the case, but that the statute having provided a particular remedy, the parties are confined to such remedy.

SIR G. INNES, J. I am of the same opinion. The case of *Winsor v. Dunford* (7) seems to conclude the matter. The Acts 1 and 2 Vic., c. 110, and 7 and 8 Vic., c. 96, formerly governed the law as to arrest on mesne or final process; and it was in consideration of both these Acts that the cases *Greville v. Bird* (1) and *Simpson v. Rodd* (2) were decided. Here the Legislature has not interfered, as the Legislature in England has. Therefore we must look at the *District Courts Act*. [His Honour read sec. 7.] A judgment debt is certainly a plea in a personal action within the meaning of that section. For my part, I cannot see the hardship. If a man has incurred a judgment debt, I do not see why he should not pay it.

Rule discharged, with costs.

Attorneys for plaintiff: *McCulloch & McCulloch*.

Attorney for defendant: *Langdon*.

May 5.

COHEN AND ANOTHER v. MOSS.

Darley, C.J. and Innes J. *Practice—Parties—Action brought in names of partners—Dissolution of partnership—Insolvency of continuing partner—Name of official assignee cannot be substituted for that of the insolvent.*

C. and M. were partners. They dissolved partnership, M. taking over the assets and liabilities of the firm, and continuing the business. An action was commenced in the District Court in their joint names, the cause of action having arisen before the dissolution of the partnership. M. became insolvent. At the hearing the official assignee of M.'s estate was present in Court, and stated that he was willing to prosecute the action, whereupon the Judge ordered the plaint to be amended by the substitution of his name for that of M.

Held, on appeal, that the Judge had no power to direct such substitution; that the action was stayed by s. 33 of 5 Vic. No. 17, and could only be continued after election by the official assignee, upon notice to the defendant, and in the name of the insolvent; and that the statement in Court by the official assignee that he was willing to go on, was not an election within the meaning of s. 33.

Lewis v. Mason (2 N.S.W. L.R. 184) followed.

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DISTRICT COURT APPEAL.

Cohen and Mackenzie were plaintiffs in an action to recover commission on the sale of certain property by them as auctioneers, and for money paid for advertisements. This action was commenced in December, 1886. In October, after the cause of action had accrued, Cohen and Mackenzie dissolved partnership, Mackenzie taking over Cohen's interest, and continuing the business. On the 18th January, 1887, Mackenzie's estate was sequestrated. At the trial, before *Dowling*, D.C.J., in April, 1887, the insolvency of Mackenzie being proved, Lloyd, his official assignee, who was present in Court, said he was willing to continue the action. Whereupon the learned Judge directed the amendment of the plaint by the substitution of Lloyd's name for Mackenzie's. The defendant objected, but the case was continued, and a verdict was given for the plaintiffs for the amount claimed. The defendant appealed.

Nash for appellant. It is clear law that a Judge has no power to substitute one plaintiff for another. If an authority is necessary, *Lewis v. Mason* (1) is exactly in point.

[SIR G. INNES, J. There is no question whatever that the official assignee would have had a right to go on with the action.]

Undoubtedly he can elect under s. 33 of the *Insolvent Act* (5 Vic. No. 17). But the District Court Judge was in error in holding that Mr. Lloyd's rising in Court and stating that he was willing to continue the action was a sufficient election under that section. [He was stopped by the Court.]

Cohen, for the plaintiffs. If an action is brought by two persons, A. and B., one of whom (B.) is insolvent, the proper plaintiffs are A. and the official assignee of B.'s estate: *Dacey on Parties*, p. 160; *Eckhardt v. Wilson* (2); *Thomason v. Frere* (3);

(1) 2 N.S.W. L.R. 184.

(2) 8 T.R. 140.

(3) 10 East 418.

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Graham v. Robertson (4). *Lewis v. Mason* (1) is distinguishable. There E. G. Lewis was the original creditor, and the Court held that it was wrong to substitute the trustees for the other Lewises who were the plaintiffs, and had no legal connection with E. G. Lewis.

[SIR G. INNES, J. S. 33 is peremptory.]

If a defendant calls upon an official assignee, and he does not elect within six weeks, his right of action is gone. But he can of his own accord make his election at any time before that. Here he was in Court, and being asked by the Judge if he would consent to have his name substituted for Mackenzie's, he said he would.

[SIR G. INNES, J. You have to satisfy us that that proceeding is contemplated by s. 33 of 5 Vic. No. 17.]

[THE CHIEF JUSTICE. It seems to me that you had no *locus standi*.]

Not on behalf of Cohen?

[THE CHIEF JUSTICE. No; because the proceedings were stayed.]

Yes; but only stayed as regards Mackenzie. There was no application to stay proceedings. It was merely an application to grant a nonsuit, which the Judge refused, being of opinion that the plaintiff had proved his case. All the cases show that the Court will be very loth to interfere where the Judge has exercised his discretion.

[THE CHIEF JUSTICE. How can the official assignee, by giving his consent at the last moment in Court, give vitality to that which is absolutely null and void? The action was stayed by the Act of Parliament. Inasmuch as the defendant can call upon the official assignee to give security for costs, a proceeding of this kind—an electing in Court—cannot have been contemplated by the Act.]

If a defendant stood by and allowed a case to go to verdict, he could not afterwards say that the proceedings were stayed. The

objection made was that Mr. Lloyd ought to have been made a party.

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[The CHIEF JUSTICE. But the action is stayed till the official assignee elects. Therefore, you could not go on at all. Might it not have been said that the Judge had no jurisdiction at all?]

There is nothing to show that the official assignee is bound to make his election before the hearing.

[The CHIEF JUSTICE. If he does not elect before the hearing, is it not a mistrial?]

But the rights given by s. 33 to stay proceedings were not exercised. As to the Judge's power to make the substitution, *Lord Bolingbroke v. Townsend* (5), *Bovill*, C.J., said, "The object here is not to substitute one defendant for another; but merely to alter the description of the defendant upon the record, to prevent justice from being defeated." So here for the purposes of law, Mackenzie and Lloyd are one and the same person.

[SIR G. INNES, J., refers to a passage from the judgment of *Kelly*, C.B., in *Olay v. Oxford* (6), cited in *Lewis v. Mason* (1) at p. 185:—"The Common Law Procedure Act in express terms authorises the addition or striking out of parties; and, though it may be a *casus omissus*, it contains no power to substitute one person for another, or persons in a representative capacity for others."]

But when no one is prejudiced, the alteration, being merely a correction and not a substitution, may be made: *Mills v. Scott* (7), per *Blackburn*, J., at p. 499.

May not the question as to the power of the Judge to make this amendment be tested in this way? He would have power to amend by substituting the official assignee for the plaintiffs before the case came on. Why not, then, after the case has been opened?

[The CHIEF JUSTICE. Why not go on in the same name?]

I should be met by *Swann v. Sutton* (8), which shows that the action must go on in the name of the solvent partner and the

(5) L.R. 8 C.P. at p. 647.

(6) L.R. 2 Ex. 54; 36 L.J. Ex. 15.

(7) L.R. 8 Q.B. 496.

(8) 10 A. & E. 623.

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official assignee. In *Baker v. Neaver* (9), where it was held that in an action by the assignees of a bankrupt the declaration might be amended by adding the name of the official assignee as a plaintiff, Lord *Lyndhurst*, C.B., observed: "The official assignee is a person appointed under the provisions of an Act of Parliament; and this is, therefore, very different from the case of an ordinary plaintiff."

In *Blake v. Done* (10) it was held that in an action by the mortgagee of a devisee against the heir-at-law, the names of the trustees of the will, who had the legal estate, might be substituted as plaintiffs for their *cestuis que trustent*.

[*Nash*. That case is distinguished in *Lewis v. Mason* (1).]

In *Lewis v. Mason* (1) the other Lewises who were the plaintiffs had no legal rights at all in the matter. *Clay v. Oxford* (6) is clearly distinguishable. There the plaintiff was not in existence at the time the action was brought. Of course the plaintiff could not be substituted for a plaintiff who was never in existence. The reasoning in *Blake v. Done* (10) seems to justify this amendment. This is not a case in which it is a question of substituting a different party altogether, as in *Garrard v. Gimbilei* (11). This substitution is within the powers conferred upon the District Court Judges by rules 84 and 85 of the District Court Rules, as well as by s. 109 of the Act. Remedial legislation must be liberally interpreted. Could the official assignee have made his election in a more solemn way than he did in this case? After that was done, the substantial merits of the case were gone into, and the plaintiffs recovered a verdict, which the Court will not now upset.

The CHIEF JUSTICE. I am of opinion, notwithstanding the able argument of Mr. *Cohen*, that there is no difficulty in this case. It appears that *Cohen* and *Mackenzie* were partners; that they dissolved partnership in October, 1886, and that *Mackenzie* continued the business of the previously existing firm, taking over the assets and liabilities. An action was subsequently commenced, the cause of action having arisen before the disso-

(9) 1 Cr. & M. 112; 1 Dowl. 616.

(10) 31 L.J. Ex. 100.

(11) 31 L.J. C.P. 270.

lution. On the 18th January, while that action was pending, Mackenzie, the actual plaintiff in the case (Cohen being only a nominal plaintiff) became insolvent. Now, the position of affairs is clearly settled by s. 33 of the *Insolvency Act* (5 Vic. No. 17), which is mandatory in its terms. That section enacts, "That all actions commenced by any person whose estate shall afterwards be placed under sequestration as insolvent for any debt or demand due to the said estate, and all proceedings therein, shall, upon the order of such sequestration being made, be stayed." Therefore, the plaintiffs had no power to go on, and the Judge had no jurisdiction to hear the case; and his jurisdiction could not be reinstated, so to speak, by the official assignee stating in Court when the case came on that he was willing to continue the action. No previous election having been made by the official assignee, the Judge had no jurisdiction. It so happened that the defendant's solicitor was in Court when the case, to his surprise, was called on. The official assignee having said in open Court, "I elect now to prosecute this action," the Judge allowed the amendment, to which exception is now taken, to be made, and, on the application of the defendant's solicitor, granted a postponement.

I am of opinion that the amendment was unnecessary. The action ought to go on in the name of the insolvent for the benefit of his creditors. *Swann v. Sutton* (8) was a very different case. As the law then existed in England, the official assignee was not in a position to continue an action. He had to bring a fresh action in his own name. Our Act (5 Vic. No. 17, s. 33) provides that the official assignee may elect to continue an action, that is, in the name of the insolvent. In the case of *Swann v. Sutton* (8), the insolvency of the plaintiff was pleaded in bar to the further prosecution of the action: a replication that the action was being carried on in the name of the insolvent for the benefit of the creditors, was held to be a bad replication, not because the name of the official assignee was not substituted, but because at that time in England no action could be brought in the name of the insolvent for the benefit of the creditors.

Under our law, the official assignee may elect to go on with

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the action, the action still remaining in the name of the insolvent, for the benefit of the creditors. Not only was it unnecessary to make any amendment, but it is clear from the decision of this Court in *Lewis v. Mason* (1) that the Judge had no power to make such amendment. In the case of an action brought by an individual on behalf of a company, there is no substitution of an individual for the company, but only permission to sue on behalf of the company. There is no case where the substitution has been allowed of the name of a person upon whom the rights of the original plaintiff have devolved. For instance, there is no power under the *Common Law Procedure Act* to substitute the name of an executor for that of a deceased plaintiff.

What has been done here? The Judge allowed this case to be heard before him at a time when no election had been made, as required by s. 33 of 5 Vic. No. 17. Therefore, this case must, in my opinion, be sent back; and the official assignee may elect in proper form, *i.e.*, by giving notice to the other side. But it is absurd to say that an official assignee can jump up in Court, and, by simply saying that he elects to prosecute the action, give the Court jurisdiction over a case which had no vitality before. I do not think that is such an election as is contemplated by s. 33 of the *Insolvency Act*.

SIR G. INNES, J. I am entirely of the same opinion. Though the facts are not exactly the same, the reasons and principles are the same as in *Lewis v. Mason* (1). Moreover, I think the course followed by the learned District Court Judge was in clear contravention of s. 33 of 5 Vic. No. 17, and he seems to have given the go-by to the express words of that section, by which the action was absolutely stayed. Although s. 18 of the *Common Law Procedure Act* of 1853 may not apply to insolvency proceedings, it seems to show clearly that this substitution was not within the contemplation of s. 33 of the *Insolvency Act*. There must be some reasonable notice from the official assignee to the defendant. It was not enough for the official assignee to get up in Court at the hearing, and declare his willingness to prosecute the action while it was going on, or was supposed to be going on (for it really had been stayed).

The Judge had no power to make the amendment. The power of adding plaintiffs, or striking out plaintiffs, does not enable a Judge without consent to say, "I will strike out the name of A. and substitute that of B." I do not think this is a power which the Legislature has conferred upon any Judge, either in the Supreme or in the District Court. It is manifest that injustice might be done. The defendant might be away. If it could be done in his presence, it could be done in his absence. We say nothing about the costs of the proceedings below. The rule will be made absolute to set aside the verdict with costs against the official assignee.

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Rule absolute, with costs.

[The case was then settled upon terms.]

Attorney for plaintiffs: *Levy & Hemsley.*

Attorney for defendant: *Mark Mitchell.*

Ex parte TURNER: *In re* DUNN.

May 10, 11.

Municipalities Act of 1867 (31 Vic. No. 12), s. 42—Election of mayor—"Such mode of voting as they may deem expedient"—Determining by lot—Municipalities Act of 1867 Amendment Act of 1874 (37 Vic. No. 15), s. 3—Acquiescence of relator—Distinction between application under s. 99 of 31 Vic. No. 12 and quo warranto.

Darley, C.J.
and
Innes, J.

There were three candidates for the office of mayor. It was arranged that each alderman should have two votes, that the candidate who had the least votes should retire, and that there should be a fresh ballot, as between the other two. At the first ballot A. polled seven votes, B. and C. five each. It was then agreed that B. and C. should draw lots to see who should retire. B. (respondent) drew the winning lot. A fresh ballot was then taken, and A. and B. got six votes each. Lots were thereupon drawn under 37 Vic. No. 15, s. 3, and B. again drew the winning lot.

Held, that this was a mode of election within the meaning of s. 42 of 31 Vic. No. 12, and a rule *nisi*, under s. 99 of 31 Vic. No. 12, granted on A.'s application, was discharged, but without costs.

Per curiam. In a proceeding under s. 99 of 31 Vic. No. 12 a relator is not in the same position as in proceedings by way of *quo warranto*, and is not disqualified from applying by acquiescence in the irregularity of which he complains.

MOTION to make absolute a rule *nisi* under sec. 99 of 31 Vic. No. 12, calling upon T. J. Dunn to show cause why he should

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not be ousted from the office of mayor of the Glebe, on the ground that he had been unduly elected.

The facts of the case sufficiently appear from the head-note and the judgment.

C. B. Stephen, for the applicant, in support of the rule. Voting by lot can only be resorted to when the votes are equal in number. Here the "mode of voting" cannot be said to come within the meaning of section 42 of 31 Vic. No. 12. That section merely gives the aldermen power to decide whether they will vote openly or by ballot. The election, if not conducted under the subsisting election law, is bad: *Woodward v. Sarsons* (1); *Ex parte Moore: In re Jeanneret* (2).

[The CHIEF JUSTICE. Is not the relator, having acquiesced in the mode of voting, disqualified from applying for this rule? In *R. v. Lofthouse* (3) it was so decided.]

No. That might prevent me asking the Court to say that he should be declared mayor; but the position of an applicant for a rule under section 99 of 31 Vic. No. 12, is not the same as that of a relator applying for a prerogative writ of *quo warranto*: *R. v. Boyd: Ex parte Savile* (4); *Ex parte Reay* (5). It is only necessary to satisfy the Court that the respondent was unduly elected.

Dawson, for the respondent, appeared to show cause.

The judgment of the Court was delivered on the following day by

The CHIEF JUSTICE. In this case it appears that at the annual election of mayor for the borough of the Glebe there were three candidates for the office, and it was thereupon arranged that each of the aldermen (who were twelve in number) should have two votes, and that the candidate who had the least votes should retire, and thereupon the election lie between the other two candidates. It turned out that one candidate (the

(1) L.R. 10 C.P. 733.

(2) *Ante*, p. 103.

(3) L.R. 1 Q.B. 483; 35 L.J. Q.B. 145.

(4) 7 S.C.R. 198.

(5) *Browning's Municipalities Act*, App. p. 173.

applicant) had seven votes and the others five each. It was then agreed that these two should draw lots as to which should retire. This was done, and the respondent drew the winning lot. Votes were then taken for the applicant and respondent, which resulted in six being recorded for each; and thereupon lots were drawn, under the provisions of the 37 Vic. No. 15, sec. 3, which resulted in the respondent again drawing the winning lot. He was thereupon declared to be duly elected mayor for the year. The applicant has now obtained a rule under section 99 of the *Municipalities Act*, calling upon the respondent to show cause why he should not be ousted from his office as mayor, upon the ground that the voting at this election was not carried out according to law; and the question for the Court is: Was the voting at this election in accordance with the provisions of the statutes 31 Vic. No. 12, sec. 42, and 37 Vic. No. 15, sec. 3? We confess the point is one not free from difficulty. We have, however, come to the conclusion that the election must stand. By the 42nd section of the Act the aldermen are entitled "to choose and appoint by such mode of voting as they deem expedient some one member of the council to be mayor"; and we think it was, under these words, quite open to the aldermen to agree that each should have two votes, and that the first voting should be for the purpose of reducing the number of candidates to two. If there had not been an equality of votes for the second and third candidates, or if one of the two candidates for whom there was such equality had voluntarily retired, then, the number of candidates being reduced to two, no further difficulty would have existed. The question, then, is whether the agreement which was come to between the candidates who had the equality of votes as to the mode by which it was to be ascertained who should retire, vitiates the election which subsequently took place. We think not. This was a matter between themselves. As each had a right to voluntarily withdraw from the contest if he saw fit, so had he a right to agree upon a mode of ascertaining which should withdraw, and the means selected, though in this case not provided for, are in fact sanctioned by the Legislature (37 Vic. No. 15, sec. 3). It must be borne in mind that if there be

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a defect in the election, such defect pre-exists the actual election of the respondent, and must be because the aldermen have selected some wrong mode of voting; but the words of the 42nd section of the Act are very large, "such mode of voting as they may deem expedient." We are of opinion that these words are large enough to embrace the agreement which was in this case made. With respect to what fell from one of the members of the Court as to the applicant not being entitled to be heard, consequent upon his having taken a part in those proceedings, we consider ourselves bound by the previous decision of this Court in *Ex parte Reay* (*Browning's Municipalities Acts*, p. 178), and also in the case of *Ex parte Johnson* (2 N.S.W. *Weekly Notes*, 74), to which we were referred by Mr. Browning. The rule is, accordingly, discharged, but without costs.

Attorneys for applicant : *Allen & Allen.*

Attorneys for respondent : *John Dawson & Son.*

May 10.

EX PARTE MCPHAIL.

Darley, C.J.
and
Innes J.

Articled clerk—Illness—Incomplete service—Fresh articles necessary to complete five years.

Where an articled clerk served four years and five months under his articles and was then compelled from ill-health to be absent nearly seven months, and returning the day before his articles expired, continued to serve his master, but, not under articles, for an additional period of seven months:—

Held, that the latter period could not be reckoned to make up the requisite period of five years. But leave was granted to enter into fresh articles, under the same or another master, and to serve under such articles to complete the requisite period.

Coghlan moved that David R. McPhail, an articled clerk, might be admitted to the final examination, notwithstanding that he had not served the full period of five years. The applicant entered into articles with Charles Davis, solicitor, on the 7th November, 1881, and continued in his service until the 10th April, 1886, when, owing to illness, he was obliged to take a

long sea voyage. He returned on the 6th November, the day before his articles expired, and then completed seven months' additional service, though not under articles. He now applied for leave to go up for examination, although his actual term of service under articles was seven months short of five years: *Ex parte Frost* (1), *Ex parte Cross* (2); or to be allowed to complete that period in the office of Mr. Davis, or some other attorney.

The other cases cited are referred to in the judgment of the Court.

Per Curiam. We propose to follow the course which was pursued in the case of *Ex parte De Fivas* or *De Jivas* (3). We think the course pursued in *Ex parte Cross* (2) would be rather a dangerous precedent to follow. The more recent cases of *Ex parte Smith* (4) and *Ex parte De Fivas* (3) show the proper and more convenient course to pursue, namely, that the clerk ought to be allowed to enter into new articles. He will have to enter into fresh articles to serve for such time as will be necessary to make up the five years with the time actually served under the old articles. He may serve the additional time with Mr. Davis, or under another solicitor.

Order accordingly.

Ex parte HARPER, In re M'CULLOCH

May 10.

Solicitor and client—Costs of making abstracts of title—Alleged agreement for specified sum—Jurisdiction of master on taxation—Action by solicitor—Jurisdiction of Court to stay proceedings.

Darley C.J.
and
Innes J.

On taxation of a solicitor's bill of cost for 65*l.* for making certain abstracts of title, the Master holding that the solicitor had agreed to do the work for a specified sum for each abstract, taxed the bill down accordingly to 16*l.* 14*s.*, which, after deducting the costs of taxation, left 1*l.* 12*s.* 10*d.* Thereupon, the solicitor, M., commenced an action at law, against his client, to recover 65*l.*, and refused to give up the deeds.

(1) 3 Dowl. 822.

(3) 4 B. & S. 992; 34 L.J. Q.B. 7.

(2) 2 Dowl. N.S. 692; 12 L.J.Q.B. 138.

(4) 1 E. & E. 928; 28 L.J. Q.B. 263.

1887. *Held*, that M. was in error in suing for the 65*l.*, and that his proper course was to have applied to the Primary Judge in Equity for a review of taxation; ordered that the action be stayed and the deeds brought into Court pending an application for review.

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Andrew Hardie McCulloch, senior, solicitor, had been retained by one Patrick Harper to do and prepare certain abstracts of title in connection with the sale of certain property belonging to Harper. The work having been done, Harper asked for a bill of costs, which McCulloch duly delivered. The bill amounted to 65*l.* Upon taxation, before the Master in Equity, Harper set up an agreement, by which, as he alleged, McCulloch had undertaken to make these abstracts of title at the rate of one guinea each. This McCulloch denied; but the Master decided that there had been an agreement as alleged by Harper, and accordingly reduced the bill of costs to 16*l.* 14*s.*, which, after deducting the expenses of taxation, left the respondent only 1*l.* 12*s.* 10*d.* as the amount of costs. The respondent thereupon commenced an action at law for the 65*l.*, and retained possession of the applicant's deeds.

A rule *nisi* was granted upon the application of Harper calling upon McCulloch to show cause why he should not deliver up the deeds, and why the action commenced by him against the applicant should not be stayed.

Field in support of the rule. R. 267 of the Equity Rules and the provisions of the *Attorneys Costs Act* (11 Vic. No. 33) show that the proper course for Mr. McCulloch to pursue was to apply to the Court of Equity for a review of taxation. As he has omitted to do that, it is not now open to the respondent to say that there is a lien upon these documents for a larger sum than 1*l.* 12*s.* 10*d.*, which was the amount found by the Master to be due. That sum having been tendered, the lien must be taken to have been satisfied.

Salomons, Q.C. (*Murray* with him), showed cause. The case of *Re Philp* (1), upon which the Master decided, was misread by him. The point there was, that if there is a written agreement between the parties, the taxing officer is to tax

according to the ordinary rules ; that is to say, where there is an admitted agreement, the taxing officer has jurisdiction to tax subject to that agreement. Here the agreement is not admitted. Mr. McCulloch denies that he agreed to make these abstracts at one guinea each. Secondly, the Master had no jurisdiction to decide whether there was an agreement or not. That being a question of fact for a jury to try, the respondent has taken the proper course in bringing his action at law. Thirdly, the Court has no jurisdiction to stay this action. On the face of the allocatur it appears that the Master did not tax at all. He simply decided that there was an agreement, and that the respondent was bound by it. What the Master did was a nullity ; therefore there can be no review. The Court can refer the matter back to the Master, but cannot stay this action.

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The CHIEF JUSTICE (after stating the facts) said : It is now contended that the Master had no jurisdiction to determine whether there was, or was not, any such agreement. For my part, I do not wish to give any decision on that point at present. Mr. McCulloch may be advised to take proceedings to obtain a decision upon the point from the Primary Judge, subject to an appeal from him to the Full Court, and at present I decline to express an opinion as to whether the Master was right or wrong in determining that he had jurisdiction to decide as to the existence of the agreement. My decision proceeds on this ground that, as the Master entered upon the taxation of these costs, the proper course for Mr. McCulloch was to have gone before the Primary Judge in Equity in order to have the taxation reviewed, and then the Primary Judge would have laid down the proper principle in which the Master ought to have taxed. If he thought the Master was wrong, it would be for the Primary Judge to say whether or not this agreement existed. Every Court has, in such a case as this, jurisdiction to determine whether there has been an agreement of this kind or not. But whether the Master has such jurisdiction I decline to say at present. It is entirely within the jurisdiction of the Equity Court to determine such a matter, and Mr. McCulloch was in error in suing for 65*l*.

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in the face of the certificate of the Master, instead of appealing to the Primary Judge. Pending taxation, and pending an application for a review, all proceedings are stayed. The allocatur or certificate of the proper officer is subject to be sent back by the Court for review. If it is not sent back, then the certificate or allocatur is absolutely final and conclusive, and it is only the amount stated on the certificate which can be sued for. Therefore, I think the proper order for us to make is that Mr. McCulloch should bring all the deeds into Court; and that they remain in Court a fortnight, to give him time to apply to the Primary Judge for a review of taxation. In the meantime, I think this action ought to be stayed. If Mr. McCulloch were to succeed in his action he could only recover 1*l.* 12*s.* 10*d.*; and as to that the defendant would probably plead tender and payment into Court, and so be entitled to a verdict. I think, also, that the applicant is entitled to the costs of this application. I may, perhaps, be allowed to add that no reflection whatever is cast upon Mr. McCulloch as a solicitor of the Court. He simply disputed the existence of the agreement, and we know how many times disputes of this kind arise. There is no reflection against his honour as a solicitor, although I think he has taken a wrong course in suing for his costs in the manner he has done.

SIR G. INNES, J. I am of the same opinion. I think Mr. *Salomons'* argument that there has been no taxation, and that, therefore, there is nothing to review, is untenable. There are several authorities to show that there can be taxation on the footing of such cases as this, where an agreement of this kind is disputed. In accordance with the Act (11 Vic. No. 33), and the Equity Rules, the proper course was to apply for a review; and that application ought to have been made to the Primary Judge in Equity, and not to this Court. I concur in thinking that the course proposed by his Honour is the best to pursue. I do not for a moment suppose that Mr. McCulloch meant to keep the deeds; but I think as Mr. McCulloch has improperly resisted this application, he ought to pay the costs of it. I also desire

to say that no imputation is cast upon Mr. McCulloch's professional reputation.

Field said that his client had no desire to cast any reflection upon Mr. McCulloch.

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*Rule absolute with costs. Action
to be stayed pending the decision
of the Primary Judge.*

Attorney for applicant : *Hughes*.

In re DAVID BROWN WALKER (GENTLEMAN, ONE, &C.), *Ex parte* KEMP.
SAME, *Ex parte* BOTTRELL.

Feb. 25.
Mar. 11.
May. 13.

*Attorney and solicitor—Misappropriation of client's money—Exercise of summary
jurisdiction of the Court to strike off the rolls.*

Darley C.J
Faucett J.
and
Innes J.

Where an attorney has received money to the use of his client, and has not accounted for it, he is liable to be struck off the rolls.

The fact that in the ordinary course of his business he paid the money into his banking account, and was unable, through monetary difficulties, to draw it out when it was required, is not a sufficient explanation.

Nor is it enough that he has actually paid it before the rule comes on for argument.

Pring moved, on the 25th February, 1887, for a rule calling upon David Brown Walker, gentleman, one of the solicitors of the Supreme Court of New South Wales, to show cause why he should not repay certain money to the applicant, R. A. H. Kemp, and answer the matter and charges contained in the affidavits of R. A. H. Kemp, O. O. Dangar, and W. E. Panton, solicitor.

From the affidavits in support of the motion, it appeared that in September, 1885, Arthur Kemp (since deceased) purchased the Goolawa Estate, Hastings River, through Mr. O. O. Dangar, commission agent, for the sum of 675*l.*, which was paid by Kemp to Dangar, who sent a cheque for 650*l.* (deducting 25*l.* as his commission) to Walker, Kemp's solicitor, to enable him to complete the purchase. On the 3rd March, 1886, Walker returned Dangar's cheque to him, giving as a reason for not having cashed it, that the vendor's solicitor had declined to take

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a cheque drawn on a Kempsey branch bank. Dangar gave Walker another cheque for 650*l*. Both A. Kemp and his brother frequently asked Walker why the matter was not completed ; Walker repeatedly said that he had sent the money to his Sydney agent. He also stated as the reason of the delay that the vendor's solicitor refused to complete without payment of 675*l*. instead of 650*l*. Towards the end of August, 1886, R. A. H. Kemp went to Sydney and saw Walker's agent, who said he had never received the money. Kemp then, through Dangar, communicated with Walker, who said he would arrange to settle the matter in the course of a few days. In the meantime A. Kemp, in July, 1886, instructed Mr. Panton, solicitor, of Kempsey, to write to Mr. Yeomans, the vendor's solicitor, who replied that Walker had prepared the conveyance, and that it would be executed on payment of the purchase money, with interest. Yeomans also told Panton that there was no dispute between him and Walker as to the amount of the purchase money. Panton was then instructed to do nothing for a time, the Kemps being in hopes of Walker arranging a settlement. On the 20th September, 1886, Arthur Kemp died ; and on the 2nd December, R. A. H. Kemp obtained letters of administration to his estate. Walker was pressed from time to time both by Panton and R. A. H. Kemp to complete the purchase, and Walker repeatedly promised to do so, and named dates by which he would pay the money, but he had failed to complete the purchase or to repay the money.

The COURT granted a rule, returnable on the 8th March, ordering the abovenamed David Brown Walker to answer the matters and charges contained in the said affidavits.

March 11.

On the 11th March,

Ralston appeared for D. B. Walker, and read an affidavit by Walker's agent, to the effect that Walker had now paid the money ; that he had telegraphed on March 8th to Walker to send down an affidavit to that effect, and had received a telegram from him that, owing to the distance of Kempsey from Sydney (200 miles), and as there was no communication with Sydney except by sea, it was impossible to send an

affidavit in time. He contended that if this amounted to a criminal charge, the Court would not deal with it until the criminal charge had been prosecuted. If there was no criminal charge, then it was enough that Walker had paid the money.

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[The CHIEF JUSTICE. Are you not in this dilemma: either you admit the criminal charge, or if you do not, you have not explained the allegations in the affidavits?]

It was decided in 1847, in the case of *Belcher v. Goodered* (1), that the Court would not grant a rule calling upon an attorney to answer the matters of an affidavit. Per *Wilde*, C.J., at p. 474.

The COURT ordered that the rule be enlarged, so as to call upon the respondent to show cause why he should not be struck off the roll; full affidavits in defence to be filed 14 days before the first day of the next term.

In the next term, on the 13th May, *Ralston* appeared for the respondent, and read the following affidavit sworn by him on the 2nd May, 1887:—1. I am the abovenamed David Brown Walker, of Kempsey, Macleay River, solicitor. 2. In the month of September, 1885, one Arthur Kemp, since deceased, purchased a property at Port Macquarie, known as Goolawa, for the sum of 675*l*. I was instructed by the said Arthur Kemp to act as his solicitor in the matter. 3. I prepared a conveyance of the said property, and forwarded same to my Sydney agent (Mr. Thomas Marshall), but the attorney for the vendor, Mr. Yeomans, objected to the conveyance, and it was not until after considerable delay that the conveyance was settled. At the time of sending the conveyance to Marshall, I also forwarded to him a cheque of Mr. O. O. Dangar's, of Kempsey, auctioneer, for the sum of 650*l*., being amount of purchase money, less Mr. Dangar's commission. 4. In the month of February, 1886, Mr. Marshall returned to me Mr. Dangar's cheque for 650*l*., stating that the vendors demanded the full amount of purchase money, viz., 675*l*., and would not accept the said sum of 650*l*. 5. In the month of March, 1886, I had occasion to borrow 600*l*., and

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knowing Mr. Arthur Kemp very intimately, I asked him if he would lend me that amount. He replied, "I cannot do so at present, as all my moneys are exhausted." I told him I held Mr. Dangar's cheque for 650*l.*, and that in all probability the money would not be required for a month or so, and that if he would lend me that amount I would return it to him. He replied, "Very well." I returned Mr. Dangar his cheque, and he gave me in lieu thereof a cheque for 450*l.* and 200*l.* 6. In the early part of the month of May last Mr. Arthur Kemp asked me to endeavour to complete the Goolawa matter. I promised to do so, and used every endeavour to find the money lent by him to me in order to complete. 7. In the month of June last past I was in Sydney and called on Mr. Yeomans and arranged to pay the amount of 650*l.*, with interest added, he telling me that his client would allow Mr. Dangar to retain his commission. I made every endeavour to find the money, but was unable to do so. I had large sums of money due to me, but was unable to get same in, and in the meantime the matter was placed in other hands. 8. I had every intention and belief that I could return the said loan when it was required to complete the said purchase, and deeply regret the delay in payment of same.

Ralston for the respondent. In paying into his own account money that he received from his client to carry out the purchase, the respondent only followed the ordinary practice. The fact that through the default of others he was unable to draw it out when required, is not sufficient to establish against him a charge of fraud or misconduct. *In re Sparkes* (2) and *In re Bonner* (3) show that the Court will not strike an attorney off the rolls when he has become bankrupt, having in his hands a client's moneys, which ought to have been paid over, unless a clear case of fraudulent misappropriation is made out against him. The worst aspect of the case against the present respondent is that he has made various excuses. But he has never denied having received the money, and has always said that he would repay it.

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In re DAVID BROWN WALKER (GENTLEMAN, ONE, & CO.),*Ex parte* BOTTRELL.

In re
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Ex parte
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Nash moved on the 1st March for a rule *nisi* calling upon the said David Brown Walker to answer the matters contained in certain affidavits, and to show cause why his name should not be struck off the roll of attorneys of the Supreme Court. From the affidavits of Mr. E. H. T. Bottrell and Mr. Andrews, managing clerk to Mr. W. W. Billyard, solicitor, in support of the rule, it appeared that in June, 1886, Mr. Bottrell contracted to purchase the Royal Hotel, at Port Macquarie, from Mr. O'Neill, and retained D. B. Walker to act as his solicitor in carrying out the purchase. He paid Walker 300*l.*; but, being dissatisfied with the manner in which the latter was acting, on the 24th July he instructed Mr. W. W. Billyard, solicitor, to take the matter out of Walker's hands. In the same month the property was destroyed by fire and the contract between Bottrell and O'Neill was cancelled. Bottrell applied to Walker for the return of the 300*l.*, but he could get no reply. On the 18th August Mr. Billyard wrote to Walker to the effect that if the money was not returned an application would be made to the Court. To this Walker replied by a telegram: "*Re* Bottrell—Am to-day remitting amount herein, less my charge"; but sent no remittance. Bottrell then, in September, 1886, commenced an action in the Supreme Court against Walker, who entered an appearance and pleaded. Subsequently, however, he withdrew his plea, and judgment was signed. Execution was issued, but the writ was not satisfied, nor had the money been paid at the time the affidavits were sworn.

A rule was granted returnable on the 8th March. It came on for hearing on the 11th, and was ordered to stand over till the first day of the ensuing term, to come on after Kemp's application.

In the next term, on May 13, the case was called on at the close of the argument in Kemp's case.

Nash, who appeared for Bottrell, said the money had been paid in March.

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Ralston appeared for the respondent, and read the following affidavit:—1. I am the above-named D. B. Walker. 2. When in Sydney in the month of June last past I was instructed by Mr. Bottrell to arrange a purchase of certain property at Port Macquarie for him. 3. On my return to Kempsey early in July last past I placed myself in communication with the vendor of the property sold to Mr. Bottrell, and was informed by the vendor that there was about 600*l.* due on the property of the Bank of New South Wales at Port Macquarie, that he expected to have 300*l.* in the course of a few days, and that if I got 300*l.* from Mr. Bottrell the matter could be arranged. 4. I sent to Mr. Bottrell for the amount of 300*l.*, and when I received this amount from him I paid the same into my credit at the Commercial Bank, Kempsey, in the belief that I could draw against my account for that sum when necessary. 5. My said account was overdrawn at the time, but it was frequently in that position, and I was not being pressed by the bank to reduce that overdraft; but afterwards, when I was required to return Mr. Bottrell the 300*l.* less my charges, the manager of the bank at which I kept my account stated that he could not honour my cheque. My transactions with the bank average about 7000*l.* per annum. I made various promises to pay the money because I had large sums due to me, and I felt sanguine of being able to pay in sufficient to my bank to enable me to draw such amount; but I was disappointed in getting in moneys due to me, and I was unable to return Mr. Bottrell his money till I did so in the month of March last. My motive in causing an appearance to be entered to the action brought by Mr. Bottrell against me was to gain as much time as I could in collecting moneys due to me; and when I found I was unable to collect sufficient moneys due to me, I instructed my agent to withdraw my plea, and my defence did not retard the plaintiff in the action more than a few weeks. 6. I paid the full amount and costs when settling the said action, and had prior thereto offered to the plaintiff the promissory notes of one Edith Cutler, who owed me over 300*l.*, and of whose property the said plaintiff was mortgagee, but the plaintiff declined to accept the promissory notes in settlement. 7. I never had any intention of

defrauding the said Mr. Bottrell, and deeply regret that through unforeseen difficulties in obtaining payments due to me, and through not getting accommodation from my bank, owing to the manager having received instructions to cause all overdrafts to be reduced, I was unable to discharge my indebtedness to him until he had recourse to legal proceedings.

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The CHIEF JUSTICE then stated that a third case had been brought to the attention of the Court by the Prothonotary. It appeared that in January a Mrs. Tracey had given the respondent money for the purpose of obtaining probate of her deceased husband's will and paying the stamp duty; that the probate was still lying in the office in consequence of the stamp duty not having been paid.

The respondent, in answer to his Honour, said that he had intended to pay it while in Sydney.

The CHIEF JUSTICE. In the case of Mr. David Brown Walker, a solicitor of this Court, there are now, in fact, three distinct charges before the Court. Two of these have been argued by his counsel, Mr. Ralston. The third matter was brought to our attention by the Prothonotary. With respect to the first charge—that of Mr. Kemp—it appears that Mr. Walker obtained a sum of 650*l.*, and for the purposes of my judgment I need not go farther back in the history of that transaction than the month of March, 1886; but it is clear that in the month of March, 1886, he did receive from Mr. Dangar a sum of 650*l.*, which was to be applied by him in purchasing an estate for his client, Mr. Kemp; that the money was never so applied; and that up to the present moment the money has never been paid to Mr. Kemp, or Mr. Kemp's representatives. An application was made to the Court, calling upon Mr. Walker to show cause why this money should not be paid, and why he should not answer the matters contained in the affidavits. Mr. Walker has now filed an affidavit which purports to contain an answer. I regret to say that, in my opinion, the statements that are made in Mr. Walker's affidavit are not

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founded on fact. Mr. Walker states that Mr. Arthur Kemp, who died in September, 1886, advanced this money to him as a loan, or, as it is said, as accommodation. He had the money in his hands, he says in his affidavit; he was wanting some assistance, and he went to Mr. Kemp and asked him for a loan of money. Mr. Kemp said he could not lend him money, and he then suggested to Mr. Kemp that he might apply the money in his hands in the direction Mr. Walker required, and Mr. Kemp allowed him to do so. If that story is to be believed, the matter was simply one between borrower and lender—a matter with which this Court has no concern. But I regret to say I cannot believe that statement. We have three affidavits made: one by Mr. Kemp, a brother of the deceased, one by Mr. Dangar, and one by a solicitor, Mr. Panton. These affidavits give a complete history of the transaction, and although there are some letters put forward by Mr. Walker, although there are statements over and over again made by Mr. Walker to these persons, in no instance has Mr. Walker attempted to put forward his present statement, that he had borrowed the money from Mr. Kemp. But, on being brought before the Court, he sets up that the transaction was a loan. This I cannot believe. I think, therefore, Mr. Walker is entirely at the mercy of the Court. He has left the matter completely unanswered. He has received the money for a special purpose from his client, and to that special purpose he did not apply it, but applied it to his own purposes, and still retains it.

With respect to the second charge, that of Mr. Bottrell, it appears Mr. Walker received a cheque for 300*l.* to apply also for a special purpose. To that special purpose he did not apply it, but, on the contrary, he states that at the time, having an overdrawn account at the bank (I assume from what he says took place in Kemp's case that he was in difficulties at the time, for he tells us that in the month of March he was in difficulties, and required 650*l.*), he paid that money into such overdrawn account. That is, of course, a proceeding altogether wrong for a man in his position. When he received that money he ought to have opened an account in some other bank, or kept it apart from where it could be touched or affected by the bank. However,

he pays the money in, and when called upon to account, he sends a telegram to say the money is on its road to Sydney. The money is not forthcoming, and he is sued. He defends the action. A declaration is filed; he pleads to it; the case is set down for trial, and he withdraws the plea; and now he justifies such proceeding by saying he was not able to pay, and required time. That is an attempt at justification to which this Court can give no effect; on the contrary, it aggravates the offence.

In the third case—the case brought to the attention of the Court by its officer—it appears that a client, a Mrs. Tracey, whose husband had made a will and had made him one of the executors, gave him a sum of money, in two sums, the last of which reached his hands on January 21 last, for the purpose of obtaining probate of the will and paying the stamp duty. That stamp duty has never been paid, and the probate still lies in the office in consequence. He says, in answer to that, he had intended to pay that stamp duty while in Sydney. He has not paid it.

Under these circumstances, what is the Court to do? I am of opinion that it is one of the first duties of this Court to see that the practitioners of the Court, the solicitors, do their duty to their clients, and do not in any way act fraudulently towards them. I am happy to know that cases of this sort are of very rare occurrence indeed; that the solicitors practising in this colony are, as a rule, men of high honour and integrity; that this Court is very rarely called upon to interfere between the attorneys and their clients; and that the jurisdiction of this Court, which is here invoked for the purpose of punishing this gentleman, is very rarely invoked; when it is invoked, we must do justice. In my opinion, this gentleman should be struck off the rolls of this Court. However, it is well he should understand that the striking his name off the rolls of the Court does not mean that he is to be perpetually debarred from practising as an attorney. Striking off the rolls of the Court is a punishment, and the Court may at any time afterwards re-admit the attorney if his conduct in the meantime has been such as to entitle the Court to believe that his conduct in the future

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will be different from that which it has been in the past. Therefore, although I am of opinion that this gentleman should be struck off the roll of attorneys of this Court, I think he may, after the lapse of one year from this date, apply for re-admission. In order, however, that he be re-admitted, he must be in a position to satisfy the Court, not only that these claims which are now made against him, and which at present remain unsatisfied, have been fully satisfied, but also that any other claims of a similar description which might have been brought against him have all been fully satisfied. If at the end of a year he is able to satisfy the Court—I allude particularly to his recompensing those persons whom he has defrauded—that his conduct will be different from the past, this Court may re-admit him. In my opinion this gentleman's name should now be removed from the rolls of the Court.

FAUCETT, J. I entirely agree with what his Honour has said, and I am also of opinion that this gentleman should be struck off the rolls, with permission to apply to the Court after a certain time for re-admission. If he can show a satisfactory course of conduct, the Court probably will allow him to be restored to the roll of attorneys.

SIR G. INNES, J. I am sorry to say that I feel constrained to agree with their Honours in thinking that this case calls for the infliction of an exemplary punishment on the respondent, who has clearly been guilty of conduct which, when it is brought home to an attorney of the Court, renders it our duty, if the Court is to maintain and exercise anything like an efficient control over its officers, to deal with the matter in some such way as that in which we are now dealing with it. No one can say that the Court is dealing in a harsh or arbitrary way; and I may express a hope that it will be a lesson to Mr. Walker, and that at the expiration of twelve months, or within some reasonable time after that, he may be in a position to apply for re-admission, and be able to satisfy the Court that it can, without any dereliction of duty, re-admit him as one of the attorneys of the Court.

The CHIEF JUSTICE. Mr. *Ralston*, in case you may be counsel in this case again, I refer you to the case of *R. v. Greenwood* (Sir W. Bl. 222).

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Attorneys for Kemp: *Fisher, Ralfe & Salwey*, for *Panton* (Kempsey).

Attorney for Bottrell: *W. W. Billyard*.

In re GREVILLE J. LEWIS (CERTIFICATED CONVEYANCER), *Ex parte* THE AUSTRALIAN JOINT STOCK BANK.

May 18.

Certificated conveyancer—Alleged misconduct—Summary jurisdiction of Court—Attorneys Costs Act (11 Vic. No. 33), s. 14—Costs.

Darley C.J.
Faucett J.
and
Innes J.

The Court has jurisdiction to deal summarily with certificated conveyancers for professional misconduct.

This summary jurisdiction will only be exercised in the clearest cases of misconduct; it is not enough to show that a professional man has, by his negligence, made himself civilly responsible.

L., a certificated conveyancer, uplifted certain deeds, with his client's authority, from the bank, where they were deposited, as L. was told, and always believed, for safe custody only. L., however, gave a receipt for the deeds, with the words "returnable on demand" added. After the deeds had been allowed to remain with him for five months, he handed them over to a mortgagee, to whom, and in accordance with his client's instructions, he had prepared a mortgage of the land to which the deeds referred. Subsequently the bank demanded the return of the deeds. L. explained how he came to part with the deeds, and said that, as he had always been informed that the deeds had been deposited with the bank for safe custody only, and not by way of security, he had forgotten that the receipt contained the words "returnable on demand." The bank commenced a suit in Equity against L., and afterwards obtained a rule calling upon L. to show cause why he should not deliver up the deeds, and answer certain affidavits.

Held, that though L. might be civilly responsible, the bank had not made out a case of misconduct which the Court could deal with summarily. If L.'s explanation, which he had made in a letter to the bank, and afterwards in his statement of defence in Equity, had been, as it ought in fairness to have been, referred to in the affidavits upon which the rule *nisi* was obtained, that rule would not have been granted. Therefore, the rule was discharged with costs.

Per FAUCETT, J. As a case of negligence had been made out, the rule ought to be discharged without costs.

Motion to make absolute a rule *nisi*, calling upon the respondent, Greville J. Lewis, a certificated conveyancer, to show cause
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why he should not return to the A.J.S. Bank certain deeds, and also to answer certain matters and allegations set forth in the affidavit of Mr. Francis Adams, general manager of the A.J.S. Bank.

The affidavit of Francis Adams, general manager of the Australian Joint Stock Bank, stated that by a memorandum dated the 3rd August, 1885, one Charles Henry Edmund Blackman deposited with the said bank the several deeds and writings specified in the schedule thereunder, written by way of equitable mortgage, as collateral security for the due payment by the said C. H. E. Blackman of all sums of money which he might become liable thereafter to pay to the said bank for advances made to him; that the lands included in the said deeds, and containing 167 acres or thereabouts, are also duly described and set forth in the said schedule; that upon the faith of the said memorandum of equitable mortgage, the said bank advanced from time to time large sums to the said C. H. E. Blackman, and there is now due to the said bank, in respect of such advances, the sum of 373*l.* 14*s.* 11*d.*, or thereabouts. That the said deeds remained in the possession and custody of the said bank until the 6th July, 1886, when the abovenamed Greville J. Lewis applied, as the agent, and with the authority of the said C. H. E. Blackman, for the loan of the said deeds, which were accordingly handed over to him upon receipt of an undertaking signed by him to return the same when demanded, such receipt being in the words and figures following :—

Received of the A.J.S. Bank on behalf my client, Mr. C. H. E. Blackman, the following deeds :—

Grant to Hugh Brady, 8th July, 1850, of 30a.

Conveyance Brady to Thornton, No. 297, Bk. 257.

Do. Thornton to Coates, No. 105, „ 290.

Do. Coates to Blackman, No. 661, „ 300.

(Signed) Greville J. Lewis.

6th July, 1886.

Returnable on demand.—G.L.

On or about the 16th March last, the bank wrote to Lewis, demanding the deeds in the terms of his receipt, but they were informed by him that he was unable to return the deeds as he had

parted with them. From enquiries directed to be made by deponent, he since ascertained that on 24th November, 1886, the said C. H. E. Blackman purported to mortgage the land included in the said deeds to one Henry Weeden Hardwick to secure an advance of 800*l.*; and that in such transaction the said G. J. Lewis acted as the legal agent both of H. W. Hardwick and of C. H. E. Blackman. The said deeds were lent by the bank to the said G. J. Lewis in manner aforesaid as a certificated conveyancer, and as the agent and legal representative of the said C. H. E. Blackman, and upon the faith of his aforesaid promise to return the same when demanded.

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The affidavit of R. B. Hogue, managing common law clerk to the firm of Stephen, Laurence and Jaques, the attorneys for the abovenamed A.J.S. Bank, stated that on the 1st day of April last he called upon Greville J. Lewis at his office, and made a formal demand of him of the various deeds mentioned in the receipt and undertaking of the said G. J. Lewis, dated the 6th July, 1886, and referred to in the affidavit of F. Adams, sworn herein on the 6th May; that Lewis informed him, in reply, that it was out of his power to return the deeds in question, as he had handed them over to his client, Mr. Hardwick, on the 10th of December last; that in the course of conversation Lewis informed him that he had acted as the agent of Mr. C. H. E. Blackman and Mr. H. W. Hardwick in the preparation of a mortgage from Blackman to Hardwick over the lands mentioned in the said deeds to secure an advance of 800*l.* and interest, and that he had recently seen Hardwick with reference to a compliance with a demand for delivery up of the deeds which had been made by the bank's solicitors to the said Hardwick, as well as to the said Lewis, and that Hardwick had refused to part with the deeds; that the said G. J. Lewis is a certificated conveyancer under the Act 11 Vic. No. 33, s. 14, and an officer of this honourable Court, and practises as such in Sydney as aforesaid.

Pilcher, for the A.J.S. Bank, appeared in support of the rule.

A. H. Simpson, for the respondent, read an affidavit by the respondent containing the following answer to the matters and allegations set forth in the affidavits upon which the rule was

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granted :—" On the 1st July, 1886, C. H. E. Blackman, with one Giblett, called upon me and instructed me to prepare an agreement for a five years' lease from B. to G. of the former's property, called 'Bonny Blink Farm,' situate at Little Hartley. The agreement was prepared and executed by the parties in my presence, and I was then instructed by B. and G. to prepare the lease in pursuance of the agreement, and to charge each party with half the charges. Upon my asking B. for the deeds, he informed me that he always kept his deeds at his bank, and would send them to me during the day. Before leaving my office, however, he gave me an order to uplift the deeds from the bank. I asked B. if the bank had a lien on the deeds, and he said, 'No; they are only with them for safe custody.' I attended at the bank on the 6th July to receive and take the deeds on my client's behalf, and as the agent and with the authority of B., I obtained the deeds referred to. I gave a receipt. [The receipt was set out in the bank manager's affidavit.] Just as I was leaving the bank, I was asked by a bank official if I should require to keep the deeds. I replied, 'No, a lessee never takes the deeds,' or words to that effect. He then said to me, 'Then you can return them?' I replied, 'Oh, yes; I'll make the receipt returnable on demand, if you like:' and did so by adding to the receipt the words 'returnable on demand' at the foot, and I initialled it. This addendum passed from my mind at once, and never re-entered it, I being then, and ever afterward, in the full belief that the deeds were B.'s to do with as he pleased. I investigated the title, made the usual searches, and found no incumbrances, and prepared the lease for the approval of the parties. Ultimately, however, the agreement was cancelled. The deeds remained in my possession till the 10th December, 1886. In November, B., in the first place through his agent, Mr. Cubitt, and subsequently personally, applied to me for a loan of 800*l.* for six or 12 months, to be secured by a first mortgage over his property known as the Bonny Blink Farm. I said to Mr. Cubitt, 'There's nothing on the place now, is there?' He replied, 'No, the deeds are perfectly free. I made all those enquiries of B. before I brought the matter up to you.' I said, 'I think I have all the deeds here.' He replied, 'Oh, have you?'

B. said he was going to give you an order to get them from the bank.' B. subsequently called upon me, and I told him I had had the deeds since July, and he replied, 'Oh! that's all right, then.' I then enquired of him, with the usual professional precaution, 'The bank has no claim on the deeds, has it?' and he replied, 'No, none whatever; they were there for safe custody only.' I then told him that I thought I should have some difficulty in obtaining a loan without a valuation, and I asked him what he valued the property at. He said, 'It's worth 2500*l*.,' and added, 'Why, the bank gave me 1500*l*. on a mere deposit of the deeds some time since, and there have been improvements since then.' I asked B. if he gave a mortgage to the bank to secure the overdraft referred to, and he replied in the negative, saying that he merely left the deeds with them."

[The affidavit then set out the transactions and correspondence in reference to the proposed loan, which was advanced to B. by Hardwick, the respondent receiving a fee of 10 guineas for his services. He handed over the deeds to Hardwick, the mortgagee, on the 10th December. In February, 1887, during B.'s absence from Sydney, Mrs. B., having applied to the bank for advances of money, was informed by the bank accountant that B. had overdrawn his account, and that the bank had not a scrap of security, and also that the bank authorities were much annoyed at B.'s going outside the bank to borrow money, as he could have had from them more money than he had borrowed on the mortgage if he had left his deeds with the bank. On the 18th March the first demand was made to the respondent by the bank for the deeds, and correspondence took place between the bank and the respondent, in which the latter explained the whole transaction as set out above. The bank commenced a suit in Equity against the respondent; and on the 5th May instant obtained an injunction restraining Blackman and Hardwick from dealing with the lands referred to in the statement of claim.]

An affidavit by Arthur Cubitt, corroborating the statements in the respondent's affidavit, was also read.

Simpson submitted that no case was made out to support this criminal application on the ground of misconduct. The bank

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had not acted fairly in suppressing all reference, first, to the respondent's letter, and, secondly, to the suit in Equity which they had commenced against the respondent. He proposed to read the pleadings.

Pilcher objected. They could not be evidence.

[The CHIEF JUSTICE. In a matter of this kind the Court is not bound by technical rules. Besides, the pleadings are filed in the office of the Court, and we can send for them.]

Simpson read the pleadings. By the statement of claim, the bank prays for relief in damages against the respondent; and he, by his statement of defence, sets up the same answer in substance as he made in his letter. Besides, it has been decided that if a person commences an action against his attorney for money owing to him, he cannot make a summary application against him to the Court to make him pay the amount until he has discontinued the action: *Anonymous* case (1). Lastly, the respondent was not acting in his professional capacity for the bank; and the cases all show that an application of this kind can only be made on the ground of misconduct by a professional man towards his client. A suit in Equity having been commenced, and it is clearly a matter for the decision of the Court of Equity.

Pilcher, in reply. It would have been a breach of confidence if the bank had divulged to the respondent, when he applied for the deeds, the amount of Blackman's indebtedness to them.

The CHIEF JUSTICE. I think the respondent, most properly, has not disputed the jurisdiction of the Court. In my opinion, the Court has full jurisdiction to deal with certificated conveyancers, if in the exercise of their profession they misconduct themselves. The Act which authorises the Court to grant certificates to conveyancers is the 11 Victoria No. 33, and by section 14 of that Act the Judges have power to direct an

examination to take place touching the applicant's skill and knowledge of conveyancing, and he must also satisfy the Master, who is an officer of the Court, that he is a person of good character and integrity. There is no provision in the Act expressly authorising the Court to deal with a conveyancer summarily for misconduct, nor is there any provision in any statute authorising the Court to deal summarily with solicitors who misconduct themselves. But certificated conveyancers are by that statute made officers of the Court; so are solicitors; and inasmuch as the Court has power to deal with one summarily, I take it that we have the same power to deal with the other summarily in all matters in which they misbehave towards their clients, or any person who has in any way employed them as conveyancers. The Court can, therefore, in my opinion, take away the certificate. That is the course which the Court will be bound to pursue if the case which is here put forward is substantiated.

Coming now to the facts of this case, it will be seen that the order given by Mr. Blackman to the respondent, was in these terms—"Please deliver to Mr. Lewis, solicitor, the deeds of my farm at Mount Victoria, deposited at the bank, in order that we may draw up an agreement between myself and Mr. Giblett, to whom I have let the farm." It will be seen that there is not one word in that order which could lead anyone to suppose that the bank at the time held these deeds as security. No doubt the word "deposited" is in this order; but there is nothing on the face of the document to show that the deeds were deposited as security. The deeds were immediately handed over to respondent, who gave a receipt for them, and he stated in his affidavit that just as he was leaving the bank he had a conversation with the clerk, in consequence of which he wrote at the bottom of the receipt, "Returnable on demand," and he further stated that this addendum passed from his mind until afterwards, when the bank applied to him, his impression being that the deeds were Mr. Blackman's to do what he pleased with. This was in the month of July, and nothing took place until the month of November following, when Mr. A. Cubitt, acting for Mr. Blackman in this matter, came to Mr. Lewis and asked him if he could obtain an advance of money for Mr. Blackman on the deeds,

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During the whole of this time, from July, 1885, to November, 1886, the bank, who had an equitable mortgage and had a right to possession of these deeds, never demanded them back, and never asked for them. What might Mr. Lewis very fairly conclude from that fact? Why, that the bank simply held these deeds, not by way of security, but, as represented by Mr. Blackman and also by Mr. Cubitt, simply for safe custody—a very common transaction. And seeing that the words “returnable on demand” were written as an afterthought, I can quite understand that Mr. Lewis forgot that he had written those words, or if he did not forget them he thought that they were written merely for the security of his own client if he should demand the deeds, and not that the bank had given them to him as a loan for a special purpose. That being the state of things, Mr. Lewis was instructed to prepare a mortgage, and got a fee of ten guineas. Now, what are the probabilities of the case? Independently of the absolute denial by Mr. Lewis, is it not an absurd thing to suppose that if Mr. Lewis remembered having entered into this undertaking with the bank to return the deeds on demand, he would for the sake of 10*l.* 10*s.*, the amount of his fees, have run the risk of handing these deeds over to another person who had no knowledge of the transaction, and thereby make himself liable to the bank for the full amount of whatever overdraft Blackman had at the bank, or render himself liable to an action at the suit of Hardwick for representing to him that there was no encumbrance upon the property when he himself knew that the bank had a lien upon the deeds? From that one may fairly conclude that he had forgotten that he had undertaken in this loose sort of way to return these deeds to the bank. Well, time still went on, and not until the month of March did the bank first seem to recollect that Mr. Lewis had these deeds at all, and the first Mr. Lewis knew was that on the 15th March the bank sent a letter by hand to him demanding a return of these deeds. From July, 1885, to March, 1886, the bank neglected their own interests and allowed the deeds, which, according to their own account, ought to have been returned almost at once, to remain in Mr. Lewis’s hands. Again, I do not understand why all

these deeds were lent for the purpose of preparing a lease. All that the bank need have lent to Mr Lewis for the purpose of preparing the lease was the deed of conveyance to Blackman. However, the bank left these documents in Mr. Lewis's hands during this long space of time, and on the 15th March they wrote demanding them back. Mr. Lewis, in reply, stated the facts of the case, and it seems to me that he gave a clear, business-like, and I must say honest statement of what occurred. If the bank wanted to prevent other persons from giving undue credit to Blackman, it was their duty to have registered their security; but they refrained from registering, and delivered the deeds to Mr. Lewis without telling him anything about their mortgage. There was nothing to show that at that time they had any lien on the deeds.

In my opinion the bank ought to have been satisfied with Mr. Lewis's letter. I have no doubt they were well advised to seek relief in Equity, but when they brought this matter before the Court, they ought to have referred to the statement of claim and the statement of defence and set out that letter of respondent; they should not have asked the Court to grant the rule which it did grant when that letter was in existence without disclosing it. The course pursued has been misconceived, and I go further and say that it has been a cruel course. The explanation of Mr. Lewis was completely satisfactory and honourable to him. I think, therefore, that this application ought to be dismissed with costs.

FAUCETT, J. I do not altogether agree with his Honour the Chief Justice, although I am of opinion that there are circumstances in this case showing a considerable amount of negligence. We have to consider whether the amount of negligence is sufficient to induce the Court to exercise the punitive power which it possesses. I cannot say that I think Mr. Lewis is altogether free from blame in this matter. That he should have given a receipt and forgotten all about it seems to be inexplicable in a professional man. Then he draws a mortgage of the property, to which these very deeds related, without saying anything to the bank, and says: "I admit I

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have made myself civilly liable, but I have done nothing unprofessional; I merely forgot." The difficulty I see is that the bank has been deprived of its security. The bank tells us that they had a deposit note of Mr. Blackman's, and that at the time these deeds were obtained the sum of 1400*l.* was owing on that very security. The question is, looking at all the circumstances of the case, has Mr. Lewis been guilty of fraud? He has by his conduct rendered himself liable to a civil action, but that does not necessarily absolve him in this Court from the consequences of his conduct, which deprived the bank of their security. The Court will not take the extreme step of striking an attorney or conveyancer off the rolls in a case of mere negligence, unless that negligence is of so gross a kind as to amount to fraud. He may be liable to his client for acts of negligence, but if there is no fraud this Court will not interfere. In this case I should be unwilling to say that Mr. Lewis has deliberately made a misstatement in his affidavit about his recollection, and his statement is supported to some extent by the conduct of the bank themselves. But if the bank trusted him and his client, that was no reason why he should deal with the security of the bank without the authority of the bank, and the only excuse given here is that he acted according to his client's instructions. I cannot, however, see any fraud. The amount of his fees shows that he had nothing to gain; and I cannot suppose that Mr. Lewis had any fraudulent intention. I think the proceeding was one which was highly censurable on his part, though it does not amount to negligence to such an extent as would justify the Court in acting upon what are supposed to be its powers, and taking the extreme measures which we are asked to pursue. But, as I do not think that Mr. Lewis's conduct is so free from censure, though I concur in thinking that the rule should be discharged, I am of opinion that it should be discharged without costs.

SIR G. INNES, J. I altogether agree with what has fallen from his Honour the Chief Justice, and I entirely exonerate Mr. Lewis from anything that was in any way blameworthy beyond some possible negligence, which certainly would not justify the

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Court in punishing Mr. Lewis as having been guilty of misconduct. The bank say that they have a charge upon these deeds, but the memorandum of equitable mortgage has not been brought before us. I suppose we may presume that there was such a document, but it would have been more satisfactory if we had had an opportunity of seeing it. However, assuming that that was all in order, it does seem to me somewhat unaccountable that the bank should have parted with their only security for the repayment of such a large sum of money as we are now told—but not on affidavit—was then owing to them, namely, 1400*l*. That would be about the full value of the property which these deeds represent. Mr. Lewis was professionally engaged by Mr. Blackman, the owner of the property, to prepare a lease. He wants to see some deed, and Blackman tells him that the deeds are at the bank. Before he goes to the bank Mr. Lewis asks how they came to be at the bank, and enquired of Mr. Blackman if the bank had got any lien upon them. Blackman said, “No, they only hold them for safe custody.” That, we know, is a common thing. Before he left, Blackman gave Mr. Lewis a point-blank, peremptory order upon the bank, requesting them to deliver up the deeds, and that order contains nothing about any return of the deeds. Anyone would have a perfect right to suppose, from the terms of that order alone, that the bank only held the deeds for safe custody. Now as to Mr. Lewis’s affidavit. I only refer to it for this reason—to show that the affidavit in support of this application is not made by the officer of the bank who had the conversation with Mr. Lewis. At that conversation no word was said as to security; and it was Mr. Lewis himself who proposed to write the words, “Returnable on demand,” on the receipt. I cannot understand how the bank, if these deeds were their only security, gave them up in that way, without any intimation to Mr. Lewis that they were anything more than mere custodians. Nothing more was done for nine months; the deeds were allowed to remain in Mr. Lewis’s hands, without any reminder by the bank, until the 10th December, when he handed them over to the mortgagee, Hardwick. This mortgage to Hardwick was duly registered before the 10th December, when Mr. Lewis handed the deeds to the mortgagee.

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The bank had a list of these registrations, and if they had exercised ordinary care or vigilance at all in looking after these deeds, I cannot understand how it was that they allowed the time between the registration of the mortgage and the 16th March to pass without one word of inquiry or demand. Surely if the bank could forget these things, it is not hard to believe that Mr. Lewis, under the peculiar circumstances which happened on the 6th July, should have forgotten that he wrote the words "Returnable on demand." That is the whole strength of the bank's case, and but for Mr. Lewis's statement that he had forgotten that these words were on the receipt, the bank would have absolutely nothing on which to base their present application. I agree most emphatically with his Honour the Chief Justice that Mr. Lewis's letter ought not to have been kept back from this Court when the application was first made, even if the application should have been made at all. I entertain no doubt that the application ought not to have been made, and in making it the bank have acted in a harsh and improper manner, and I believe that they have so acted in their desire to bring pressure to bear upon Mr. Lewis to make some kind of terms with them in regard to their Equity suit. I think the conduct of the applicants was most reprehensible, and the only manner in which we can mark our sense of that conduct is by discharging the application with costs.

FAUCETT, J. I only dissented from the ruling of their Honours because I do not think the rule should be discharged with costs.

Rule discharged with costs.

Attorneys for applicants : *Stephen, Laurence & Jaques.*

May 18.

COOPER v. RUTHERFORD.

Darley C.J.
Faucett J.
and
Innes J.

New trial — Verdict demonstrably wrong — Principles on which new trials are granted.

A new trial should never be granted except where the verdict is such that justice has not been done, or such as reasonable men ought not to have found.

NEW TRIAL MOTION.

DECLARATION. 1. For that the plaintiff was possessed of certain lands at Brown's Creek, and the defendant was possessed

of land adjoining thereto, known as "The Brown's Creek Gold-mining Co.'s claim," whereon the defendant carried on mining operations, and wrongfully permitted large quantities of foul water, mud, refuse from mining operations, sand, and sludge to flow upon and overspread the plaintiff's land, whereby the plaintiff suffered damage, &c. 2. That the said damage, &c., was caused by the negligent and unskilful management by the defendant of his mining operations. 3. Trespass.

PLEAS. 1. Not guilty. 2. Leave and license. 3. That, before the committing of any of the alleged trespasses and grievances, the plaintiff, being seised in fee of the said lands, demised the same to the defendant to hold from year to year from the 1st November, 1877, by virtue of which demise the defendant entered upon the said lands, and became possessed of the same for the term aforesaid, and, whilst the said demise remained in force, in his own right, committed the alleged trespasses and grievances, as he lawfully might.

The lease pleaded by the defendant was an informal document, the material part of which was in the following terms:—"Cooper agrees to let a portion of his paddock to make a dam."

At the trial before Sir G. Innes, J., and a jury of four, at Bathurst, a verdict was given for the defendant.

A rule *nisi* for a new trial having been granted on the ground that the verdict was against evidence,

Wise, for the plaintiff, in support of the rule, argued that the verdict was demonstrably wrong.

Teece, for the defendant, showed cause. He contended that there was evidence to support the verdict. The disapproval of the Judge would not necessarily influence the Court in granting a new trial: *Metropolitan Railway Co. v. Wright* (1). If the Court granted a new trial it should only be on payment of costs by the plaintiff: *O'Keefe v. Gogerty* (2); *Stuart v. Watson* (3).

The case being reported solely for the observations of the Court on the principles upon which new trials will be granted, it

(1) 11 App. Cas. 152.

(2) 10 S.C.R. 15.

(3) 2 Weekly Notes (N.S.W.) 94.

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1887. is unnecessary to refer to the arguments at greater length, or to
COOPER set out more of the evidence than appears in their Honours'
v. judgments.
BUTHERFORD

The CHIEF JUSTICE. His Honour who presided at the trial of this case has reported that he is eminently dissatisfied with the verdict, and has further stated that in his opinion the verdict was a most improper one. No doubt we are not bound by the opinion of the Judge who presided at the trial, although, of course, we treat his opinion with the greatest respect. It, however, seems to me that this verdict was demonstrably wrong. The facts appear to be these :—The defendant desired to rent a portion of the plaintiff's land for the purpose of making a sludge dam in connection with the working of a gold-mine. Some discussion takes place, but no arrangement is come to, and the matter is left in the hands of Mr. Edwards, the defendant's manager. An agreement is drawn up, which contains these words : "Cooper agrees to let a portion of his paddock to make a dam." It is a very short agreement, and it is clear that only a portion of the land was let for the purpose of making a dam. The place is selected and marked out, and the dam is made, and also a trench to conduct the water, after the deposit of the sludge, back to the water-race. The defence set up is that the plaintiff, in conversation with the defendant, agreed to let him have the use of the whole of his flat land (the subject of the present action), and that the agreement must be read subject to that understanding. During the argument of Mr. Teece, who has urged everything that could possibly be urged on behalf of his client, his Honour Mr. Justice *Faucett* pointed out that the defendant was bound by the written agreement. What passed by that agreement was land "to make a dam." It is idle to refer to letters written some years afterwards. The question is not what the defendant intended to get, but what he did actually get, under the agreement. Instead of entering into a fresh agreement for more land, he allows the sludge to flow over the dam, and cause serious injury to the rest of the plaintiff's property. Taking all the facts of the case into consideration, and looking at the evidence, I am of opinion that

the verdict found by the jury was against the evidence, and, further, that it was demonstrably wrong.

No doubt the Court should be very careful in granting new trials on the ground of the verdict being against evidence, and it may be safely laid down that a new trial should never be granted except where the verdict is such that justice has not been done, or such as reasonable men ought not to have found. That principle is laid down as far back as the time of Lord *Mansfield*, C.J., who, in *Bright v. Eynon* (4), gives the grounds and reasons which have prevailed up to the present day. He says (at p. 393), "A general verdict can *only* be set aside by a *new trial*, which is no more than having the cause more deliberately considered by another jury, when there is reasonable doubt, or perhaps a certainty, that *justice has not been done*." In the opinion of his Honour, who presided at the trial of this case, justice has not been done. Lord *Mansfield*, C.J., goes on: "If *unjust* verdicts were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice* that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial."

This Court has generally followed the principles laid down in *Fisher v. Kemp* (5), where Sir A. *Stephen*, C.J., said: "There were three classes of cases in which a new trial would or might be granted. The first of these was of cases where the verdict was *demonstrably* wrong, *i.e.*, where it could be clearly shown that the jury had arrived at a wrong conclusion. In these cases the losing party would have a new trial as a matter of right, and without payment of costs. The second class of cases was of those in which the verdict was not demonstrably wrong, but in which the Court thought, upon the whole, that it was *against the weight of evidence*. A new trial would be granted or refused in such cases, according to their circumstances; and, if granted, it might, according to the nature of the case, be either with or without costs. The third class included those in

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(4) 1 Burr. 393.

(5) *Stephen's Sup. Ct. Practice*, p. 150; *Foster's Dist. Ct. Practice*, 1870 p. 225 app.

1887. which the verdict could neither be described as demonstrably
COOPER wrong, nor as against the weight of evidence, but in which,
v. from other circumstances, *the ends of justice* required that there
RUTHERFORD should be further investigation." I think this case comes under
Darley C.J. the first of these classes, and that this verdict was demonstrably
wrong. I am therefore of opinion that the rule should be made
absolute for a new trial.

FAUCETT, J. I also think this verdict was demonstrably
wrong. The document is clear, though, to a certain extent,
indefinite. It was clearly an agreement for the occupation of
land required for the purpose of making a dam. This lease
being indefinite in its terms, the parcels can only be determined
by oral evidence. But we cannot, in interpreting this lease, go
beyond that. If it had been intended to include all the flat
land that is eventually covered by the sludge that comes upon
it, that intention would have appeared on the agreement. If
the defendant gives evidence of that kind, it is contrary to the
lease which he himself produces. The case seems to me to be so
clear that I cannot understand how it could have been argued
with so much zeal and ability by Mr. Teece. I think the
construction of this document for which he has been contending
is contrary to every principle of the construction of deeds.
Evidence has been admitted so contrary to the terms of the
lease that I cannot think the verdict should stand. Moreover,
his Honour has reported that the verdict was perverse.

SIR G. INNES, J. No Judge could more jealously watch the
exercise of the jurisdiction, undoubtedly vested in us, of
interfering with the findings of juries on questions of fact
than I do; and no Judge could more readily acknowledge that
such jurisdiction is only to be exercised with extreme circum-
spection. And in this, as in all other cases, I should be loth to
disturb the verdict except upon the strictest application of the
principles by which we are bound to be guided. I have no
hesitation in saying that I concur with their Honours in thinking
that this verdict is manifestly and demonstrably wrong. I refer
to what is said by Lord Selborne, L.C., in *The Metropolitan*

Railway Co. v. Wright (1) at p. 153 : " I have always understood that it is not enough that the Judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the Judges in the Court where the new trial is moved for, might have come to a different conclusion ; but there must be such a preponderance of evidence—assuming that there is evidence on both sides to go to the jury—as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the Judge, should return such a verdict." I apply these words to this case, and I say that there was such a preponderance of evidence as to make the verdict "unreasonable and almost perverse." As I told the jury, there was evidence on both sides ; and I told them that if they thought Mr. Rutherford's evidence was perfectly accurate, they could give a verdict for the defendant. But I pointed out that his evidence was in direct conflict with that of all the other witnesses in the case. I pointed out to them that the evidence of Edwards, the resident manager, whose mental faculties were perfectly clear—though he was in a very weak state of bodily health—who was put forward by Rutherford to support his story, was so far from supporting it, that his evidence was, as a matter of fact, in direct contradiction of Rutherford's story. Edwards himself said that Rutherford, after using strong language about what he called "old Cooper's obstinacy," said he would leave the matter in Edwards' hands ; and that he (Edwards) made the arrangements. What was done? It was well known that what was wanted was land to make a sludge dam. Edwards pointed out the land, and cut a trench. That being so, what other impression could the lessor have than that this trench was to be the boundary of the portion of land required ? If a man lets a portion of a paddock for any purpose, and the lessee says, "There I will put up my fence," that is surely sufficient to show the extent of the land so leased, without the necessity of using the word "boundary." I do not for a moment question Mr. Rutherford's truthfulness or honesty ; but I think he was under a mistaken impression as to the arrangement that had been made. He was no doubt truthful, but inaccurate. It has been urged, on the one hand, that the jury, knowing Mr.

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1887. Rutherford to be a man of high standing, preferred his uncorro-
 COOPER borated evidence to that of the witnesses who were in conflict
 R. with him; and, on the other hand, that they gave him a verdict
 RUTHERFORD because he was a local man. I should be loth to say that the
 Innes J. jury were in any way influenced by any improper motives, or
 that they had any other desire but to do their duty. I should be
 very sorry to impute improper motives to any jury. But, though
 this was not a case in which I was justified in directing a verdict,
 still I summed up in such a way as to make me think that the
 verdict was demonstrably wrong, and altogether unreasonable.
 In conclusion, I may refer to the words of Lord Halsbury, at p.
 156 in the case I have already cited (1): "I think the test of
 reasonableness, in considering the verdict of a jury, is right
 enough, in order to understand whether the jury have really
 done their duty. If their finding is absolutely unreasonable, a
 Court may consider that that shows that they have not really
 performed the judicial duty cast upon them; but the principle
 must be that the judgment upon the facts is to be the judgment
 of the jury, and not the judgment of any other tribunal."

*Rule absolute. Costs of this motion
 to be paid by the defendant.
 Costs of the former trial to
 abide the event.*

Attorney for plaintiff: *W. T. A. Shorter*, for *Dodd* (Carcoar).

Attorneys for defendant: *Curtiss & Barry*, for *McIntosh &
 Co.* (Bathurst).

May 19, 20.

BURROWS AND ANOTHER v. CRIMP.

*Deed—Construction—Absolute conveyance by trustee under will—Reversion only
 in testator—Words of conveyance—"Enfeoff," &c.—Unexpired lease to trustee
 —Estoppel—Priority of registration.*

Darley C.J.
 Faucett J.
 and
 Innes J.

C., having an unexpired lease of certain real estate from Q., was appointed
 executor and trustee jointly with one Burke under Q.'s will, with directions to
 sell all the testator's real and personal estate. Burke disclaimed. After Q.'s
 death, C., pursuant to such direction, sold to the plaintiffs the real estate, o

which C. was in possession under the lease. The conveyance recited the testator's seisin in fee in possession and his death, C.'s appointment as trustee jointly with Burke, and Burke's disclaimer, the direction to sell, and sale by C. as trustee, but contained no reservation of C.'s lease, and purported to convey the fee to the plaintiffs by, amongst other operative words, the word "enfeoff."

Held, that C. was estopped from setting up that the plaintiffs took subject to the lease; and that, although the testator had only a reversion, the conveyance passed the fee simple in possession freed from the lease.

The conveyance was registered by the plaintiffs, and subsequently C. registered his lease.

Held, that such registration by the plaintiffs gave their conveyance priority over C.'s lease under section 11 of the *Registration of Deeds Act* (7 Vic. No. 16); C., after his conveyance to the plaintiffs in the form in which it was executed, having no lease in existence to register.

EJECTMENT for an allotment of land at Chippendale with hotel thereon. The plaintiffs relied upon a conveyance to them by defendant as sole trustee under the will of one Quick, deceased. The conveyance was executed on November 1st, and registered on November 2nd, 1886. This conveyance recited the testator's seisin "for an estate of inheritance in fee simple in possession;" his will devising the land, with other property, to defendant and one Burke, upon certain trusts during the life of testator's wife, and thereafter upon trust to sell the property and divide the proceeds as thereby directed; the disclaimer by Burke, and contract of sale by C., as sole trustee, pursuant to the will, to the plaintiffs. The testatum stated that "in pursuance of the premises" and in consideration of the purchase money, &c., C. (called "vendor") "granted, &c., and enfeoffed unto the plaintiffs and their heirs" the land in question, "and all the estate, right, title, interest, &c., whatsoever of him, the said vendor, therein or thereto." The only covenant was the usual trustee's covenant against his own acts.

The defendant's title was also documentary. First, a lease from Quick (deceased) to the defendant from the 17th September, 1883, to the 17th September, 1888. This lease was registered on the 21st December, 1886, subsequently to the registration of the conveyance from the defendant to the plaintiffs. Secondly, the will of Quick (who died on the 17th June, 1884), devising all his real and personal property

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CRIMP. to two trustees, Crimp (the defendant) and one Burke, upon trust to sell. Burke disclaimed. The defendant, as sole trustee, sold by auction the property in question, on the 1st October, 1886, to the plaintiffs. Thirdly, the conditions of the sale by auction at which the plaintiffs bought. By these conditions, it was, amongst other things, stipulated that the property was to be sold subject to existing tenancies or occupancies. Before and at the time of the sale the defendant occupied as an hotel-keeper the property in question, under his lease from the testator. The defendant, subsequently to the registration of the conveyance by him to the plaintiffs, registered his lease.

By consent, a verdict was found for the defendant, leave being reserved to the plaintiffs to move to have the verdict entered for them.

A rule *nisi* was granted on the grounds: 1. That, prior to and at the time of the conveyance of the land mentioned in the writ of ejectment by the defendant to the plaintiffs, the term claimed by the defendant had become merged in the freehold. 2. That the said conveyance operated as an enfeoffment, and entitled the plaintiffs to maintain ejectment against the defendant. 3. That the said conveyance, having been registered prior to the registration of the lease to the defendant, thereby took priority of the said lease, and suspended the same.

Salomons, Q.C., and *Ralston*, for plaintiffs, in support of the rule.

Owen, Q.C., and *Donovan*, for the defendant, showed cause.

Salomons, Q.C. First, the defendant is estopped from setting up his own lease: *Bucknill v. Mann* (1). He cannot, as vendor, derogate from his grant. If he could set up a lease to himself for five years, he could equally set up one for 99 or 999 years, which is absurd. The language of the deed shows that it was an absolute conveyance of the fee simple. By s. 25 of 7 Vic. No. 16, it is enacted that a certified copy of a duly registered deed of feoffment "shall operate as and for all purposes

equivalent to livery of seisin as to the lands and hereditaments comprised in, and intended to be conveyed by such deed." Secondly, the defendant's leasehold estate merged (a) in the fee which he took as trustee. For where a term meets with a freehold, it is swallowed up in the fee: *Salmon v. Swan* (2). The rule applies equally where, as here, a person, who is lessee, becomes the legal owner of the fee under a trust. In *Williams' Real Property* (14th Edition), p. 431, it is laid down: "The consequence of this doctrine is, that if any of these estates should happen to be vested in any person, who at the same time is possessed of a term of years in the same land, and no other estate should intervene, the estate of freehold will infallibly swallow up the term, and yet be not a bit the larger. The term will, as it is said, be merged in the estate of freehold." At p. 432 the very case of a trustee is considered, "The merger of a term of years is sometimes occasioned by the accidental union of the term and the immediate freehold in one and the same person. Thus, if the trustee of the term should purchase the freehold, or if it should be left to him by the will of the former owner, or descend to him as heir-at-law, in each of these cases the term will merge." The proper course for the trustee to take was to disclaim.

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[SIR G. INNES, J. Is there any mention of the lease in the will?]

No. But the defendant could have re-created his term by selling to the plaintiff subsequent to his term. The law is clearly stated in *Watkins' Principles of Conveyancing* (Edition of 1832), at p. 14. "If a term for years vest, otherwise than by act of law, in the same person who is seised of a greater estate, the term merges in the freehold, and becomes extinct: *Chamberlain v. Ewer* (Bulst. 12), *Salmon v. Swan* (Cro. Jac. 619). But a person may have a term of years in his own right, and a freehold in right of another, without the less estate merging in the

(2) Cro. Jac. 619.

(a) It has been thought useful to . of merger, although no decision was set out the arguments on the question given by the Court upon it.

1887. greater : *Litchden v. Winsmore* (1 *Rol. Abr.* 934, 11 *Vin. Abr.* 431). And if the union is by act of law, the term does not merge ; as, if a husband have a term in his own right, and the freehold descend to his wife, the term is not merged : *Platt v. Sleep* (*Oro. Jac.* 275, 1 *Bulst.* 118) ; and see *Lee's Case* (3 *Leon.* 110, 4 *Leon.* 37, *Plowd.* 418). Where either of the two estates which are held in different rights is an accession to the other by *act of law*, as by marriage, descent, executorship, intestacy, &c., the less estate will not merge : *Co. Lit.* 338 a. But the less estate will merge as often as one of them is an accession to the other by *the act of the party* : 3 *Prest. Conv.* 309, 310. It is laid down by Rolle, that if a person, having a term for years as executor, purchases the reversion, this extinguishes the lease for years, though he has it in another right ; but it shall be assets : 1 *Roll. Abr.* 934, pl. 9, and see *Bro. Abr. tit. Executor*, pl. 174 ; *Extinguishment*, pl. 57." Thirdly, the conveyance from the defendant to the plaintiffs must prevail over the defendant's lease by virtue of priority of registration : *Registration of Deeds Act* (7 Vic. No. 16), s. 11 ; *Amending Act* of 1861 (24 Vic. No. 7), s. 1 ; *Titles to Land Act* of 1858 (22 Vic. No. 1), s. 18. Suppose the defendant had sold the plaintiffs a lease for 50 years, and the plaintiffs registered first, could the defendant put his five years' lease before the plaintiffs ?

Owen, Q.C., for the defendant, showed cause. The plaintiff purchased subject to certain conditions of sale, the 4th of which stated that the sale was to be "subject to existing tenancies and occupancies." Therefore the plaintiff was put upon inquiry.

[SIR G. INNES, J. But it is an absolute conveyance.]

No. It cannot be anything but a conveyance of the reversion.

[FAUCETT, J. How can that argument be used in a Court of Common Law ? We cannot go behind the deed. You cannot import the conditions of sale into the deed.]

I merely say that they show what the plaintiff bought.

[FAUCETT, J. Is not your remedy in equity ?]

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Secondly, the doctrine of merger does not operate where the larger estate is in a trustee. Where two estates coalesce for a limited purpose only, there can be no merger. In 4 *Bac Abr.* p. 863, *tit. Leases and Terms* (R) : " Another way whereby a term for years may be defeated is by way of merger, where there is a union of the freehold or fee and term for years in one person at the same time ; in this case the greater estate merges and drowns the less, because they are inconsistent and incompatible. And yet there are several exceptions out of this rule, not only where such union is transitory, but even where it is permanent and continuing." Here the trustee only holds the lands for a specific purpose ; therefore, the union of the two estates in him is only transitory. Where a devise was made to a trustee for the benefit of an unborn child, it was held that the union, pending the birth of the child, while the mother was *enceinte*, was only transitory, and, therefore, there was no merger : *Nurse v. Yearworth* (3)

It is admitted that where an estate is held *en autre droit* there is no merger ; the case of a trustee comes within the principle. It is also admitted that if the union be by act of law, the term is not merged. The estate of a trustee comes to him by act of law, not by any act of his own.

[FAUCETT, J. He might have disclaimed. Is it not, therefore, his own act ?]

No. That very argument was used in *Jones v. Davies* (4), in which it was held that though the estate might have been disclaimed, it was held *en autre droit*, and therefore there could be no merger. It was contended that there must have been some period at which the trustee could have disclaimed, and that, therefore, the estate was in him by his own act. At p. 778, *Pollock, C.B.*, says : " In the present case the reversion came to the wife by devise, and through the wife, and in her right, to the husband. It is only by a forced construction of the words

(3) 2 Mod. 8, Finch's Rep. 155, cited in 4 *Bac. Abr.* at p. 864. (4) 5 H. & N. 766.

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that this could be called an acquiring of the estate by the husband's act. It was argued that he might renounce all benefit from the devise ; and, therefore, if he took no step to do so he acquired by his own act ; but in this view we cannot acquiesce." So a trustee cannot, by the act of not disclaiming, be said to vest the estate in himself so as to create merger. In the *Cruse's Digest*, p. 276, *tit. VIII.*, "Estate for Years," p. 43, it is laid down : "It is settled, upon the same principle (*i.e.*, that there is no merger where the term and the freehold are held in different rights) that if a lessee makes his lessor executor, the term is not merged ; for the lessor takes the term in right of his testator, without any act of his." The principle is that the executorship is thrust upon him without any act of his own ; and the rule applies equally to a case like the present.

[The CHIEF JUSTICE. In *Chambers v. Kingham* (5), C., an administrator, granted an underlease for a term of years of land held by him as administrator. The under-lessee assigned the residue of his term to C. It was held that there was in equity no merger of the term.]

So in *Sugden's V. and P.* (14th Ed.), 617, "It is clear that if the coalition be not occasioned by the act of the termor, the term will not merge."

[The CHIEF JUSTICE. There is a wide distinction between merger at law and merger in equity, as *Fry*, L.J., points out in *Chambers v. Kingham* (5).]

According to *Sugden*, the principle upon which all the common law cases go, is that where the coalition is not occasioned by the act of the termor, there is no merger.

Lastly, as to registration, there must be *bona fides*: 7 Vic. No. 16, s. 11 ; 22 Vic. No. 1, s. 18. The plaintiffs here cannot in good faith set up their prior registration. They saw the conditions of sale, and bought subject to existing tenancies. Knowing that the defendant was in occupation of the premises,

the plaintiffs were bound to inquire if he had a lease. A purchaser buying subject to a lease and registering in order to destroy a lease, would be guilty of fraud.

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[The CHIEF JUSTICE. How can he discover except by going to the Registry ?]

By investigating the title. He can make a requisition upon it, as provided by the conditions of sale.

[The CHIEF JUSTICE. Would not the usual course have been to have put in the description of the property that it was subject to a lease for five years ?]

That is not necessary.

Donovan followed on the same side. First, assuming there was a valid subsisting lease of this property from the testator, all the defendant could take under the will would be a reversion. The testator had only the reversion to devise. That was all that the devisee took, and necessarily all he sold. Secondly, there could be no merger in this particular case, as the two estates did not meet in the same person. The devise of the fee was not to the defendant, but to him jointly with another. That alone would prevent merger. Here the devise was to Crimp and Burke ; and, by Burke's disclaimer, the property passed to Crimp entirely by operation of law. As to the alleged distinction between merger at law and merger in equity, there is really no such distinction. Merger is a doctrine of law, recognised in equity, though equity will interfere, in certain cases, as, for instance, of forfeiture, to prevent the operation of the doctrine where it would be inequitable to enforce it. It is admitted that if a lessee makes his lessor executor the term is not merged ; and yet an executor accepts an estate just as much as a trustee does under a will ; what he takes is the estate of the testator. Where a termor for years purchases, there is merger. But that is not this case. There must be some "active acquisition" of an estate, as in *Jones v. Davies* (4). It must be a beneficial interest "actively acquired," as where an executor purchases. Here the

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vendor purports on the face of the deed to sell as trustee. Therefore, he sells what the testator devised to him, *i.e.*, the reversion only. The recitals show that the defendant sold as a trustee, and not in any other capacity. The only covenant in the deed is the usual trustee's covenant, that he has not encumbered, and for the production of deeds. This case is not governed by s. 11 of the *Registration Act*. That section only applies where there are two deeds affecting the same identical property; here the vendor has in his individual beneficial capacity a term of years, and in his capacity as trustee a reversion, and what he sells and conveys as such trustee is the reversion; so that what the vendor has registered is a deed conveying only the reversion—a thing quite different from the term of years vested in the defendant under the lease which the defendant has registered.

[FAUCETT, J.: But he has chosen to convey the whole estate by the deed.]

We contend that the deed does not, according to its proper construction, convey the entire estate. It does not assign the term of years.

[The CHIEF JUSTICE. If you want to rectify the deed, you ought to go into equity].

We submit that the deed does not require rectification. The intent of the deed, the key to its construction, is to be gathered from its recitals. There are express recitals in the deed as to the testator's death, the appointment of the vendor as executor and trustee, and the direction (in the will) to sell; and the testatum contains the words "in pursuance of the premises," *i.e.*, in pursuance of the contract. It is clear from these recitals that all the defendant contracted to sell was the estate which was devised to him as trustee. This must be so, notwithstanding the general words used. The general words, "all the estate," &c., mean all the estate of the vendor as trustee.

[The CHIEF JUSTICE. Must not this Court look at the words actually used, which purport to convey the fee?]

These words must be read in connection with, and as governed by, the recitals, showing that what was sold was the estate of a trustee, who, *as a trustee*, was not possessed of the term of years. The lease stands good, notwithstanding the devise of the fee to the trustee. It is perfectly consistent with the existence of the fee simple in the testator. First, then, I contend that there was no merger of the term of years held by the defendant in his individual and beneficial capacity in the reversion devised to him as a trustee for sale ; secondly, supposing such a merger did take place, still the conveyance to plaintiffs does not convey more than the reversion. Lastly, as to priority of registration, the 11th section of the *Registration Act* applies only to cases where the property comprised in the two deeds registered is identical ; in other words, where the two deeds are inconsistent. Therefore, the registration of the conveyance of the reversion would have no priority, merely because it was registered before the lease. Besides, the first registration, in order to gain priority, must be *bonâ fide*. If a purchaser buys with knowledge of an existing lease, he cannot, by promptly registering his conveyance, gain priority over the lease.

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[FAUCETT, J. When a person, having bought a property *bonâ fide*, finds out that there is a lease outstanding, is not the natural thing to do to register ?]

The purchaser here must be taken to have been aware of the lease, and of occupation under it. A search of the register is not sufficient. In many cases the lease may be verbal. The purchaser, seeing that the premises are occupied, should enquire into the nature of the tenancy or occupancy of the premises. That is the object of clause 4 in the conditions of sale.

[The CHIEF JUSTICE. But if you sell, subject to a lease, ought not there to be some reference to the lease in the conveyance ?]

That is not necessary, because a lease is not an encumbrance. In many cases the existence of a lease gives an enhanced value to the property. In *Dart's Vend. and P.* a lease is not included in the things required to be mentioned in a conveyance.

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[The CHIEF JUSTICE referred to *Doe d. Robinson v. Allsop* (6).]

Salomons, Q.C., in reply. The vendor having conveyed the fee is estopped from saying that he has any interest left in him. It might be that we could not succeed if the lessee had been a third party. Secondly, the legal estate in fee must swallow up the lease. Lastly, as to the 4th condition of sale, the vendor conveys the whole property in the most absolute terms; he cannot afterwards turn round, relying upon the conditions of sale, say that he has sold subject to his own existing tenancy.

The CHIEF JUSTICE. If we had any doubt we should reserve our judgment; but we really have no doubt on two at least of the points. As I understand the facts, Crimp had a five years' lease from Quick. Quick died on the 17th June, 1884, and by his will appointed Crimp and Burke executors and trustees. Burke, immediately on Quick's death, disclaimed, whereupon Crimp became sole trustee.

One of the trusts was that the trustees should sell a certain time after the death of the testator's wife.

Crimp, having these separate estates in him, and acting under the trusts, put the property up for sale by auction. He sells it, and a conveyance is prepared. That conveyance is in its terms an absolute conveyance. There can be no doubt that Crimp had, under the terms of the lease, absolute power to do what he liked with the property during the five years that it was vested in him. Now we come to the deed. [His Honour read the recitals set out above.] What were these lands and hereditaments? They are the lands and hereditaments in the recital mentioned. Then he grants, &c., and "enfeoffs"—that word in itself denotes livery of seisin, giving possession. Well, it is said that this deed must be read subject to the recital by which the defendant undertakes to convey as trustee. What does he undertake to convey as trustee but the estate of inheritance left to him by Quick, that is, an estate in fee simple in possession. It does not matter whether he is in possession in one or in several rights. Everything that was in him

passed. An estate for life, or any less estate, would pass in the same way. I am of opinion that the defendant is estopped from saying that he conveyed less than the estate in fee which the deed purports to convey.

As to the question of priority of registration, it was no doubt proved that there was a lease previously in existence. But once the deed is registered this deed would, in a Court of law, override a previous unregistered lease. We need not consider the effect in equity. When the deed was registered, there was no lease in existence to register. I think, therefore, that the verdict in this case should be set aside, and that the judgment should be entered for the plaintiffs.

FAUCETT, J. I quite agree with Dr. *Donovan* that the vendor conveyed, and intended to convey, whatever his testator left him.

The recital that he was trustee must be taken together with the recital that he had an estate in fee simple in possession, which his testator had devised to him. That seems to me to get rid of the whole difficulty. Because when he conveys the estate which he had got from his testator, he conveys the whole estate that is in him, and, by the well-known doctrine of estoppel, he cannot say that he conveys anything less. Our decision does not detract from the force of the argument of Dr. *Donovan* that the vendor, having a term, might have conveyed the estate to a third party, and that the purchaser from him would have been protected in the case of such a sale as has been made in the present case.

As to the second question, whether this registration gives priority to the deed, it is perfectly clear that s. 11 of the *Registration Act* only applies where the property registered subsequently is identical with the property for which priority is claimed. It is impossible to say, according to the common principles of ordinary law or ordinary composition, that this deed can be construed as conveying merely the reversion. But if you go outside the deed, the external evidence leads one to the same conclusion. Admitting that Quick had only a reversion, there is nothing in the deed to show that it conveyed only the reversion. The language of the deed on the face of it shows that what was

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1887. conveyed was the fee simple. Dr. *Donovan* has strenuously
 BURROWS contended, and has argued with great ability, that the language
 v. of the deed must be construed in accordance with the external
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 Faucett J. of things existing at the death of the testator. But I think the
 deed must be taken to speak for itself.

This deed being registered takes precedence over any former deed dealing with the same property. It is said, however, that this deed cannot take effect unless it were executed *bonâ fide*. But, as his Honour has said, where a person has become owner of property, *bonâ fide* and honestly, and hears that there is a prior deed in existence relating to the same property, it is a perfectly honest thing for him to promptly register his conveyance. That is what the law intends. The object of the law of registration is to keep people awake, and make them alive to their duties. It will not disentitle the registering vendee to the benefit of the Act.

Further, this defendant professes to have the entire interest in fee simple in possession. He professes to sell that interest; and, therefore, he is estopped from saying that he is selling less than the conveyance purports to convey.

SIR G. INNES, J. I am of the same opinion; and I do not think I should be justified in taking up the time of the Court by adding anything to what has been said, and to the reasons in which I fully concur.

*Rule absolute to set aside verdict
 and enter judgment for the
 plaintiffs.*

Attorney for plaintiffs: *Ashdown.*

Attorney for defendant: *John Williamson.*

[PRIVY COUNCIL.]

Feb. 18. HORDERN AND ANOTHER v. THE COMMERCIAL UNION ASSURANCE
 COMPANY.

Fire insurance—Latent ambiguity on policy—Question for the jury whether the policy covered the goods.

Where the evidence disclosed that on the policy there was a latent ambiguity, which made it necessary to go into the consideration of other documents and to

resort to parol evidence, it ceased to be a question of construction for the Court, but became a question of fact for the jury, namely, whether the policy covered the goods.

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APPEAL from the decision of the Supreme Court (reported 5 N.S.W. L.R. 309) granting a new trial on the motion of the defendants.

On February 18th, 1877, the following judgment of the Lords of the Judicial Committee of the Privy Council (1) was delivered, dismissing the plaintiffs' appeal, with costs.

Their Lordships do not think it necessary to call upon counsel for the respondents in this case. They desire to express their appreciation of the clear and able manner in which the case has been argued by Mr. Byrne, and in their opinion the appellant has not suffered by the unavoidable absence of Sir Horace Davey.

In the Supreme Court of New South Wales the Chief Justice and the other Judges were of opinion, though not all for the same reasons, that the trial of this cause had not been satisfactory, and that there ought to be a new trial; and two of them, the Chief Justice and Mr. Justice *Windeyer*, were of opinion that the new trial should go on the main question in the case, namely, whether the goods which were stored in the premises, formerly No. 758, and were there injured by the fire, were covered by the policy. In such a case where there is a judgment of three Judges, who appear to have dealt with this case with great care and attention, granting a new trial on the merits, their Lordships would be very slow indeed to recommend any interference with that decision.

Their Lordships, after careful consideration, have arrived at the conclusion to which attention has been directed in the course of the argument that the real question, going to the very merits of the case between the parties, was a question for the jury, and that question does not appear to have been submitted to them. If the question had been one of the construction of the policy alone, it would be for the Court; but when once the evidence disclosed that on that policy there was a latent ambiguity, and

(1) Present: LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PHAHOCK, SIR RICHARD COUCH.

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that it was necessary to go into the consideration of other documents, and to resort to parol evidence to solve that ambiguity, their Lordships consider that there it ceased to be a question merely of construction of the instrument, and raised a question of fact to be determined by the jury, that question being, as already pointed out, whether the policy covered the goods, that is to say, whether it covered that portion of the premises in which these goods actually were stored at the time of the fire. Mr. Cohen, for the insurance company, has saved us some trouble by his undertaking that if the order for a new trial should be affirmed, and a new trial should be had, the Company would raise but the one question, viz., whether the policy covered the goods, but retaining their right on that question to point out and rely on the fact that the proposal does not describe the premises as distinct and separate, or standing apart from each other.

Inasmuch as their Lordships are about to recommend Her Majesty to affirm the decision of the Court below, and as there must be a new trial, solely on that one question, going to the very merits, they refrain from expressing any further opinion upon the case; and will therefore humbly recommend Her Majesty to affirm the judgment of the Court below granting a new trial, and that this appeal be dismissed with costs.

Appeal dismissed with costs.

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HYLAND v. THE COMMISSIONER FOR RAILWAYS.

Aug. 15.
 Martin C.J.
 Faucett J.
 and
 Innes J.

Railways Act (22 Vic. No. 19), ss. 108, 133—"Colonial" wine—Wine grown in South Australia—Construction of conditions—Ambiguity—Popular meaning of term.

The word "colonial" in the Railway Regulations must be taken to embrace all the colonies; and therefore "colonial" wine means wine grown in any of the Australian colonies, and not merely wine grown in New South Wales.

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So held, by the Privy Council (affirming the decision of the Supreme Court) for three reasons: First, if the expression "English, colonial, or foreign," in the conditions indorsed upon the contracts for the carriage of goods by the Government railways, is to be taken as an exhaustive distribution, the word

"colonial" must embrace all the colonies. Secondly, if a charge is imposed by the Government, they should impose it in clear language, and any ambiguity must be construed in favour of the person charged. Thirdly, the practice of carrying South Australian wines at the lower rate, having been in force for some years, must be taken as a sort of contemporaneous exposition of the ambiguity.

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Seem, that evidence of a popular meaning, or a meaning generally accepted by men of business, of the term "colonial wine" would have been conclusive.

APPEAL by special case from a decision of Mr. *Marsh*, S.M.

Information: The complainant (T. F. Hyland) alleged that on the 9th January, 1884, a dispute had arisen within the meaning of s. 108 of the Act 22 Victoria No. 19 (*Railways Act*), concerning the amount of tolls due to the Commissioner for Railways from T. F. Hyland for and in respect of the carriage by the said Commissioner for the said T. F. Hyland of certain goods, that is to say, colonial wine from Hay to Sydney by railway. And the said T. F. Hyland informs me that the said Commissioner claims to charge for the carriage thereof at the rate of third class goods, within the meaning of a certain table of merchandise rates, &c., and that the said T. F. Hyland disputes this charge and claims that the said Commissioner is entitled to charge for the carriage of the said goods only as special class goods, within the meaning of the table aforesaid, whereupon the said T. F. Hyland prays, &c.

The defendant pleaded not guilty; and, after hearing the parties and the evidence adduced by them, Mr. *Marsh*, S.M., on the 21st January, 1884, determined that the term colonial wine, within the meaning of the railway rates under the *Railways Act*, meant wine the product of this colony.

It was admitted upon the hearing that the complainant had wine, the produce of and manufactured at South Australia, shipped at Hay to Sydney. The defendant seeks to charge under class 3 (as foreign wine). The complainant claims that they should be carried under special class B. (as colonial wine). The difference in the rates on goods carried since the 1st October, 1883, amounted to 623*l*.

The following evidence was taken:—Thomas Francis Hyland, on oath, states: I am a partner in the firm of Penfold and Co., South Australia. I have paid for goods (wine), the produce
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of South Australia, being carried on the New South Wales lines of railway between Hay and Sydney for this, the third year; and paid under class B special, as "colonial" wine. The last lots we have sent over since first August last. The Commissioner has sought to charge at the rate of ten pounds per ton. We received no notice till October last. Beginning of October I was in Sydney, and received, by wire, from our people the notice.

I did not book the goods myself; McCulloch and Co. did. Wright, Heaton and Co. handed the receipts, as agents for McCulloch and Co. I do not know what passed between Wright, Heaton and Co. and the railway authorities. I informed the Commissioner these were South Australian wines, between first and third of October, 1883. Every cask is branded Penfold and Co., Adelaide, outside. That was the only time.

For the defence: David Kirkcaldie: I am assistant traffic manager, railway department. In February last I sent instructions to the station master at Hay respecting wines imported into the colony. This is the document. [Objected to and not put in.] Cross-examined: It was sent privately, and to all other stations as well, and was not advertised. It was signed by me. To the Bench: The complainant only knew when the first extra charge was made of the difference in the rates, unless he made application for the rate he paid, as he says, up till February, 1883.

The appeal came on for argument on August 15th, 1884.

Owen, Q.C., and *W. J. Foster* for the appellant. The appeal is from a decision of the magistrate under s. 108 of the *Railways Act* (22 Vic. No. 19) (1). The question is under what class South Australian wine should be classed for toll when carried on the Government railways; that is to say, whether it is to be

(1) 22 Vic. No. 19, s. 108: "If any dispute arise concerning the amount of the tolls due to the Commissioner or concerning the charges occasioned by any detention or sale thereof under the provisions herein contained, the same shall be settled by a Justice, and it shall be lawful for the Commissioner in the meanwhile to detain the goods, or (if the case so require) the proceeds of the sale thereof.

included with foreign wine, or whether it must be comprised within the designation "colonial" wine, which is placed in a special class, and carried at much lower rates. For two or three years the Commissioner for Railways under the New South Wales Government had interpreted the words "colonial wine" as including wine made in South Australia; and the respondent had carried the appellant's wine at the lower rates, and, while that construction of the word "colonial" was adhered to, the appellant had entered into large contracts for the supply of his South Australian wines to merchants in New South Wales. In October, 1883, the rates were suddenly raised, without notice to the appellant. In answer to the appellant's remonstrance, the respondent informed him that the term "colonial" wine only meant wine made in this colony, and that the Department would no longer carry South Australian wine at the same rates. The respondent having altered the charges without giving notice to the appellant, is estopped from disputing the appellant's claim for reimbursement of the amount of the extra charges.

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[The CHIEF JUSTICE: I cannot see how there can be an estoppel. The public are the persons interested, and the mistake of an official cannot operate as an estoppel.]

The appellant was entitled to have his South Australian wine carried at the lower rate, as "colonial" wine, which must mean wine produced in any of the Australian colonies. The word "colonial" being used in the railway regulations without any limitation, must be taken in its widest sense. Where the Legislature has intended to limit its signification, it has done so in express words, *e.g.*, in the *Colonial Wine Sale Act* of 1876 (40 Vic. No. 7), s. 10 (Interpretation Clause), it is expressly enacted that "the words 'colonial wine' or 'Australian wine' in this Act shall be taken to include cider and perry, all being exclusively manufactured within, and the produce of fruit grown in this colony." But in the *Licensing Act* of 1881 (45 Vic. No. 14), s. 26, "colonial wine licenses shall authorise the licensee . . . to sell . . . wine, cider, or perry, the produce of fruit grown within any Australian colony," and in the 4th schedule to

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that Act, which gives the form of such license, that form is headed "Colonial Wine License."

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[The Court stopped them.]

Salomons, Q.C., and *A. H. Simpson*, for the respondent. As a preliminary objection, we submit that the decision of the Justice under s. 108 of 22 Vic. No. 19, is not given after the hearing of an information or complaint within the meaning of s. 1 of the *Justices Appeal Act* (45 Vic. No. 4).

Owen, Q.C., referred to s. 133 of 22 Vic. No. 19 (2). Moreover, the objection was not taken below. The parties agreed to the special case being stated.

The preliminary point was thereupon given up.

Salomons, Q.C. The word "colonial" only refers to New South Wales unless by Act of Parliament a more extended meaning is expressly given to it. The Act of 1862 (26 Vic. No. 16), to regulate the sale of wine produced in the colony, is called the *Sale of Colonial Wines Regulation Act*, and similarly in the *Colonial Brandy Sale Act* (30 Vic. No. 15) the word "colonial" is used as applying to brandy, the product of this colony, without any interpretation clause to limit its application. These Acts were in existence at the time when the Railway Regulations as to rate of tolls were promulgated, and before the *Licensing Act*.

[SIR G. INNES, J. Look at the printed conditions on these contracts: "Notice is hereby given that the Commissioner for Railways will not be liable for the loss of or injury to any article

(2) 22 Vic. No. 19, s. 183: "Wherein this Act any question of compensation, expenses, charges or damages, it shall be lawful for any railway officer or agent, and all persons called by him to his assistance, to seize and detain any person who shall have committed any offence against the provisions of this Act, and whose name and residence shall be unknown to such officer or agent, and convey him with all convenient despatch before some justice without any warrant or other authority than this Act, and such justice shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender.

or articles, or property of the descriptions following, that is to say, gold or silver coin of the realm, or of any foreign State, &c., English, Colonial, or foreign stamps, &c." This clearly contemplates a class of "colonial" things by themselves.]

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Victorian stamps would be "foreign" within the meaning of that document.

The COURT held that the term "colonial wine" included wine grown in any of the Australian colonies, and allowed the appeal.

The following were the reasons prepared by their Honours for transmission to the Privy Council.

SIR JAMES MARTIN, C.J. I have listened very carefully to the many and full arguments advanced, and I am of opinion that the matter is by no means free from difficulty. The Government, or Railway Commissioner, or the authorities who had power to frame this scale of tolls or charges, have not used expressions as clear as is desirable. In the last regulation promulgated, fixing the scale of tolls for goods carried on our railways, there is a scale of charges under the head of "special class," and this special class includes some goods which are under the letter A, and some under the letter B, and in reference to the goods so included in this list the charges are considerably less than the charges made in respect of other goods. Under the letter B, we find included "colonial wine." The question for us to determine is whether, under the term "colonial wine," wine made in the colony of South Australia is included.

It appears that the plaintiff, having been already charged, or threatened to be charged, by the Railway Commissioner with a rate of toll on certain wines which he had sent by railway into this colony, appealed, under the 108th section of the *Railways Act* (22 Vic. No. 19) to a Justice to determine whether the charge or demand made by the Commissioner was valid or not, and the Justice, under the powers given to him under that section, decided that the Commissioner was right, and that the words

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“colonial wine” did not include wines made in the colony of South Australia. We have now to determine whether that interpretation or decision was right or wrong.

There are several colonial Acts in this colony to which we have been referred, which regulate the making and sale of colonial wine, and in those Acts colonial wine is undoubtedly meant to refer to the wines of this colony only. The interpretation clauses in those statutes say that where colonial wine is mentioned, it shall refer to wines made in this colony. But, with reference to the argument drawn from these Acts by the learned counsel (Mr. *Salomons*), it appears to me that the answer to that is that they were expressly passed for the purpose of dealing with colonial wine of this colony, and nothing else. It, therefore, seems impossible to draw from these Acts any conclusion as to the general meaning of the term “colonial wine”

Now, the term colonial wine by itself is sufficiently large to include wine made in any of the other colonies, and certainly wine made in any of the Australasian colonies. The Legislature, in passing the last *Licensing Act*, in section 25, gave authority for the issue of colonial wine licenses, and the license to be issued under that authority is drawn in a form so as to authorise the sale of wine, the produce of fruit grown in the Australasian colonies. So that, so far as that Act is concerned, the Legislature, in using the words “colonial wine,” not only designed it to include the wine of this colony, but of any of the Australasian colonies.

But it is said, in answer to the argument drawn from this late Act, that we must look at these scales of charges from the beginning, and go as far back as 1879, or perhaps an earlier period, to find the meaning of the words “colonial wine” in all of them; and it is said—and with some show of reason—that the meaning given to the term “colonial wine” in the first of these promulgated regulations, should be held to be the same throughout, and that if the term “colonial wine,” used in 1879, meant the wine of this colony only, it should still have the same meaning.

But, in reply to that, I would refer to the regulations which would be found in the Act, setting forth the circumstances under

which the Commissioner is not to be held liable for injury or loss of the articles carried. Among other articles, I find "English, colonial, or foreign stamps, maps, writings, title deeds, &c." It would have been sufficient to have used the terms "stamps, maps, writings, title deeds, &c.," in whatever part of the world they might have been manufactured. But that regulation pointed out English and foreign. We all know what English and foreign stamps are, and what colonial stamps mean throughout the British empire. So that there the word colonial is used in a large, comprehensive sense, dealing with all the colonies of England. The question is, whether the same word used in another part of the regulation should not have the same interpretation. I think it should have the same interpretation. I cannot avoid seeing that the matter is not as clear as is desirable. But where there is a doubt—and I admit there is some reason for doubt in this case—I think we ought to give this large interpretation, so as to make the charge upon the public as small as possible. This is a charge upon the public for the use of the railways, and where a matter is in doubt, the interpretation which would impose a smaller charge upon the public is that to which the Court should give its sanction.

The conclusion at which I have arrived is, that the magistrate was wrong, and that the term "colonial wine" must be held to include wine made in South Australia. No harm can arise from such a decision, because, if it be wrong, the remedy rests with the Government, who can alter it in twenty-four hours. They may confine the low rate to wines of this colony. But, I think, taking the regulation as we find it, and admitting that it is somewhat doubtful what was intended, the interpretation is as I have put it.

FAUCETT, J. There is no doubt that if we were to look at the earlier Acts, the term "colonial wine" must be restricted to that made in this colony. Giving full effect to that argument, we have to consider whether these regulations can be construed by any reference to these Acts at all. But were these regulations intended to be construed as an Act of Parliament? Were they drawn up with the strictness and accuracy of Acts of Parliament?

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They were drawn up for the purpose of the railway being used for commercial purposes. It appears to me that the Commissioner used these terms, which are popular ones, in their popular and ordinary meaning.

The question is whether the popular or the strict legal meaning is to be given? In the first place, looking at the matters contained in classes A. and B., which include a large number of things manufactured in other colonies, there is no reason why we should say that one particular description of article should be considered as applying only to articles manufactured in this colony. We are told that these regulations are not drawn up for the purpose of protection, but to get the utmost returns from the public railways. The popular meaning of "colonial wine" is any wine produced in this or any other colony. I had, and still have, some doubt, but that doubt has been, to a large extent, removed by the notice referred to.

We would not speak of Victoria or South Australia as a foreign State, although, strictly speaking, such a term would apply to them as well as to England. An English judgment is a foreign judgment here, as well as in Ireland and Scotland. Taking the three classes of goods to be English, foreign and colonial, the latter cannot, according to the ordinary meaning of words, be confined to New South Wales.

SIR G. INNES, J. For some considerable time my mind has been in some doubt as to the meaning of the word "colonial" in these regulations, because I see very great force in the arguments deduced by Mr. *Salomons* from the same word in the statutes he has referred to, his contention being that in this regulation made under the authority of the *Railways Act*, that term was used in the same meaning and was intended to apply only to wine produced in the colony. The Acts regulating the sale of wine produced in the colony (26 Vic. No. 16 and 40 Vic. No. 7) are now repealed by 45 Vic. No. 14. But, looking at the regulations in question, here it seems to me that it was intended that the words "colonial wine" should have a more extended meaning, and should apply to wine grown in any of the Australian colonies. If it had been the intention of the

Commissioner to include only wine made in this colony, such intention could have easily been expressed by using the words, "wine grown in New South Wales."

Appeal allowed.

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PRIVY COUNCIL APPEAL.

On December 16, 1884, Hyland sued the Commissioner for Railways, on the common counts, for overcharges on certain wine, which the plaintiffs were unlawfully compelled by the defendant to pay to the defendant for the carriage of the said wine from Hay to Sydney, since the 3rd August, 1884, amounting to £654 5s. 5d.

The trial took place on the 20th September, 1885, before *Windeyer, J.*, and a jury of four.

W. J. Foster appeared for the plaintiff.

Stephen, Q.C., Salomons, Q.C., and O. B. Stephen for the defendant.

It was admitted on both sides that the facts in this case are the same as those before the Court on the 15th August, 1884. A verdict was therefore entered for the plaintiff, the amount being fixed by consent at £550 1s. 5d.

On the 26th October, 1885, the defendant moved for a new trial, which was refused, for the reasons given in the previous case between the same parties.

On the 6th Nov., 1885, leave to appeal to Her Majesty in Council was granted to the defendant.

On the 17th June, 1887, the judgment of the Lords of the Judicial Committee of the Privy Council was delivered.

Lords present: LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, SIR RICHARD COUCH.

JUDGMENT:—The question in this appeal is rather a small one, whether we regard the extent of the argument which is presentable upon it, or the effect of the decision. As their

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Lordships understand, the Government have it in their power to alter these regulations at any moment, and if they are dissatisfied with the legal effect of their former regulations, they may set the matter right according to their own judgment.

We are asked to reverse the decision of the Supreme Court, which assigns the more extended meaning to the two words, "colonial wine;" and it is contended that the words "colonial wine" mean only wine grown in New South Wales. The controversy turns on very narrow considerations, and this Committee would be very reluctant to reverse a decision of the Supreme Court on such a point unless they saw their way very clearly to a contrary conclusion. So far from that, they think that if the matter came before them *de novo* they would agree with the Supreme Court. No doubt it would be very important if it could be shown from an examination of the statutes or public documents running through a series of years that what may be called a popular meaning or a meaning generally accepted by men of business had prevailed of the term "colonial wine;" but so far from that, nothing more is shown than this, that if the term "colonial wine" had been used to express wine grown in New South Wales alone, there would have been no impropriety in the expression. That, their Lordships think, is the very highest point which the argument of Sir Horace Davey attained. Therefore the examination of the statutes leaves the matter very much where it stands on the regulations themselves. But their Lordships are led to think that the larger meaning must be attached to the words by three considerations. The first is that the expression "colonial" in the general condition has, as they think, the larger meaning. It is not quite without difficulty there, but the word "foreign," where it is used of gold or silver coin, clearly means everything that is not gold or silver coin of the realm, and therefore does not include colonial gold or silver coin. Using "foreign" in the same sense where it occurs in the second passage—the passage "English, colonial, or foreign"—then the word "colonial" must be taken to embrace all the colonies, otherwise the distribution of stamps into "English, colonial, or foreign" would not be an exhaustive distribution, which it is evidently intended to be. That is one

reason. Then they think that there is substance in the argument that if the Government intend to impose a charge they should impose it in clear language, and if the language is found to be ambiguous, it must be construed in favour of those on whom the charge is sought to be imposed. Their third reason is that they find that for some years—it does not appear how long—the wine of South Australia was conveyed at the lower rate of charge which the regulations impose on colonial wine, and they look upon that practice as a sort of contemporaneous exposition of the ambiguous document, which is of value in construing it now.

The result is that they agree with the Supreme Court, and they will humbly advise Her Majesty to affirm the decision and dismiss the appeal. The appellants must pay the costs.

Appeal dismissed with costs.

Attorneys for plaintiff: *Norton & Co.*

Attorney for defendant: *Williams, C.S.*

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BOWMAN v. FARNELL (MINISTER FOR LANDS).

July 28.

Claims against Government Act, 39 Vic. No. 38—Tort will lie against the Crown.

PRIVY
COUNCIL.

Held, by the judicial committee of the Privy Council, affirming the decision of the Supreme Court (reported 7 N.S.W. L.R. 1), that the words of the Act 39 Vic. No. 38, extending the provisions of the Act 20 Vic. No. 15 in favour of the subject, are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants.

The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Justice also requires that full effect should be given to the words of the Act. The local Governments in the colonies, as pioneers of improvements, have to embark in undertakings which in other countries are left to private enterprise, *e.g.*, the construction of railways, canals, &c., in the course of which it is necessary to employ many inferior officers and workmen; therefore, to apply the maxim that "the King can do no wrong" would work much greater hardship than it does in England.

This was an appeal from a judgment of the Supreme Court of New South Wales of the 7th of January, 1886 (1).

Sir Horace Davey, Q.C., and *Levenson* for the appellant (the defendant).

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Rigby, Q.C., and Phipson Beale for the respondent (the plaintiff).

The judgment of their Lordships (LORD HOEHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH) was delivered by

SIR BARNES PEACOCK. This is an appeal from a judgment or order of the Supreme Court of New South Wales in an action by the respondent, as plaintiff, against the Hon. James Squire Farnell, the present appellant, who was then Secretary for Lands of the colony, and had been duly appointed, under the Act 39 Vic. No. 38, of the Legislature of New South Wales, to be sued as the nominal defendant on behalf of the Government of the colony.

The declaration contained two counts. The first charged that the Government by their servants broke and entered the lands of the plaintiff, situate in the colony, and lighted fires thereon, and thereby burned down and destroyed the grass, trees, and fences of the plaintiff on the said lands. The second alleged that the Government by their servants so negligently and wrongfully lighted and maintained certain fires on the plaintiff's said lands in the first count mentioned, and upon lands adjoining thereto, and conducted themselves so negligently and wrongfully in and about the care of the said fires, and the taking of precautions against the spreading of the same, that by reason thereof the said fires spread over the lands of the plaintiff and burned down and destroyed large quantities of grass and fencing thereon. The count also charged special damages.

The defendant pleaded not guilty, and also demurred upon the ground that the declaration was bad in substance, and stated as grounds for demurrer, first, that the Government were not liable to be sued in an action of tort, and two other grounds which, if tenable, have not been relied on in this appeal.

The main question to be determined is whether, under the provisions of the Act 39 Vic. No. 38, of the Colonial Legislature, the Government of the colony is liable to be sued in an action of tort.

The majority of the Judges held that such an action would lie, the learned *Chief Justice* dissenting. The demurrer was therefore overruled, and it was ordered that judgment be entered for the plaintiff on the defendant's demurrer. From that order the present appeal has been preferred.

Their Lordships are of opinion that the order is right, and ought to be affirmed.

At the time of the passing of the 39 Vic. No. 38, two Acts of the Colonial Legislature were in force—viz., the 20 Vic. No. 15, and the 24 Vic. No. 27. The former of those Acts was intituled "An Act to give relief to persons having claims against the Government of New South Wales;" the other "An Act for the amendment of the law as to claims against the Crown." The latter Act recited that it was expedient to adopt the law of England relating to petitions of right, and to adapt the same as nearly as might be to the circumstances of the colony, and the Act was passed in conformity with the recital. By the 7th section it was provided that nothing in the Act should give to the subject any remedy against the Crown in any case in which he would not have a remedy before the passing of the Act.

That Act was repealed by the 39 Vic. No. 38, and has never been renewed, probably because it was considered that the repealing Act afforded a better and more expeditious remedy for every case in which a petition of right would lie. The Act 20 Vic. No. 15 was also repealed by the 39 Vic. No. 38, but as the latter Act contained provisions *in pari materiâ*, though giving more extensive remedies to persons having claims against the colonial Government, it will be well to refer to the provisions of the repealed Act. The preamble was as follows:—

Whereas disputes and differences have arisen and may hereafter arise between the subjects of Her Majesty the Queen and Her Majesty's local Government in the colony of New South Wales, the subject matter of which disputes and difficulties has arisen, or may arise, within the colony; and whereas the ordinary remedy by petition of right is of limited operation, and is attended with great expense, inconvenience, and delay; Be it therefore enacted, &c.

It was then enacted, among other things, that:—

In all cases of dispute or difference touching any claim between any subject of Her Majesty and the colonial Government of the colony of New South Wales

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which may have arisen, or may hereafter arise, within the said colony, it shall and may be lawful for any person or persons having such disputes or differences to present a petition to the Governor of the said colony setting forth the particulars of the claim of such petitioner, which petition shall, within 14 days from the presentation thereof, be referred by the Governor to his Executive Council: and if the said Governor shall, with the advice of his Executive Council, think fit, the said petition shall be referred to the Supreme Court of the said colony for trial by a jury, or otherwise as such Court shall, after such reference, direct.

The Act then provided safeguards for cases affecting the Royal prerogative, for the appointment of some person to be a nominal defendant to the petition, and for answering the claim out of the consolidated revenue of the colony.

The Act 39 Vic. No. 38 contains no preamble or recital, but it extends the provisions of the 20 Vic. No. 15, in favour of the subject. It is intituled "An Act to enforce claims against the colonial Government, and to give costs in Crown suits," and after repealing the 20 Vic. No. 15, and the 24 Vic. No. 27, it enacts by sections 2, 3, 4, 5, 6, and 7 as follows:—

"2. Any person having or deeming himself to have any just claim or demand whatever against the Government of this colony may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition, and the Governor, with the advice of the Executive Council, may, by notification in the *Gazette*, appoint any person resident in the colony to be nominal defendant accordingly. Provided that, if within one month after presentation of such petition no such notification be made, the Colonial Treasurer for the time being shall be the nominal defendant. 3. The petitioner may sue such nominal defendant at law or in equity in any competent Court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow, or may be awarded on either side, as in an ordinary case between subject and subject. 4. The nominal defendant in any case under this Act shall not be individually liable in person or property by reason of his being such defendant. 5. In any action or suit under this Act all necessary judgments, decrees and orders may be given and made, and shall include every species of relief, whether by way of specific performance, or restitution of rights for recovery of lands or chattels, or payment of money or damages. 6. In any action or suit by the Crown, or Attorney-General on behalf of the Crown, costs shall follow or may be awarded as in an ordinary case between subject and subject. 7. The Colonial Treasurer shall pay all damages and costs adjudged against any such nominal defendant, or costs awarded against the Crown or Attorney-General under this Act, out of any moneys in his hands then legally applicable thereto, and forming part of or belonging to the consolidated revenue of this colony, or thereafter voted by Parliament for that purpose, and in the event of such payment not being paid within 60 days after demand execution may be had for the amount, and the

same be levied upon any property vested in the Government of this colony, but not upon any property real or personal vested in it on behalf of the Imperial Government, or to which such last-mentioned Government has any claim or is in anywise entitled."

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Thus, unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the Government. These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants. Under the present Act, if the Governor, with the advice of his Executive Council, does not within a certain specified time appoint a nominal defendant, the Colonial Treasurer for the time being is, by the enactment of the Legislature, to be the nominal defendant, and in an action against the nominal defendant the rights of the parties are to be the same as in an ordinary case between subject and subject, and in the event of the damages and costs, if any, adjudged against the nominal defendant not being satisfied within a certain period the 7th section enacts that execution may be had for the amount in the manner therein provided.

It must be borne in mind that the local Governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works, for which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that "the King can do no wrong" were applied to colonial Governments in the way now contended for by the appellant it would work much greater hardship than it does in England.

It appears from the recital in Act 20 Vic. No. 15, that one of the reasons which induced the Legislature to pass that Act was that the ordinary remedy by petition of right was of limited operation and insufficient to meet all cases of disputes and differences which had arisen or might arise between the subjects of the Queen and Her Majesty's local Government in the colony. It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition

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of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the Legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown, and when it is found that the Act uses words sufficient to embrace new remedies it is hard to see why full effect should be denied to them.

Their Lordships further observe that in the Act 24 Vic., which was directed to amend the procedure on petitions of right, there was a proviso that it should not give to the subject any new remedy; but in the Act 20 Vic., where one of the motives of the Act was that the existing remedy was limited and insufficient, there was no such proviso. So also in the Act 39 Vic. (which repeals that of 24 Vic.) there is no repetition of the repealed proviso. The makers of these laws seem to have well kept before their eyes the two distinct processes, that of opening a larger scope of remedies to the subject, and that of amending procedure without any enlargement of remedy. Their Lordships, therefore, cannot see why in construing the Act now under consideration a Court of Law should go out of its way to strain the words and to give them a meaning other than their ordinary literal meaning. If they did so they would be introducing a certain amount of repugnancy into the Act itself; for the fifth section gives to the subject a right to have a specific performance of contracts, which is not available against the Crown. The third section expressly says that, in every case, not the proceedings only, but the rights, shall be the same, and that judgment shall follow as in an ordinary case between subject and subject. Those enactments are not consistent with holding, as the learned *Chief Justice* expresses it, that the words "any just claim or demand whatever" can mean no more than such claims or demands as the law then recognised, and that they cannot include a claim for damages *ex delicto*.

Their Lordships wish to remark that in the course of the judgment in which the learned *Chief Justice* dissented from his colleagues he expressed some broad views relating to the

prerogative of the Crown, which have not been discussed at the Bar on this appeal, and in which their Lordships must not be understood to concur.

Reference was also made by the learned Judges below to some observations which were made in the Ceylon case, *Appu v. The Queen's Advocate* (9 L.R. Appeal Cases, 571), as if they were intended to lay down a universal principle that actions *ex delicto* cannot be brought against the Crown; but their Lordships were speaking solely with reference to the law of Ceylon, as to which everyone was agreed that there existed no practice of suing the Crown on torts, whereas there did exist a practice of suing on contracts. It was argued that certain words in an ordinance were to be excluded from application to any kind of suit by a subject against the Crown, because they were capable of application to actions on torts, which did not exist. It was in answering that argument that their Lordships' observations were made, and it has no bearing whatever on the present controversy. Their Lordships will humbly advise Her Majesty to affirm the judgment of the Supreme Court. The appellant must pay the costs of the appeal.

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Appeal dismissed with costs.



CASES

DECIDED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN ITS

Common Law Jurisdiction,

DURING THE THIRD TERM, 1887.

CONNOLLY v. LYNE (MINISTER FOR WORKS).

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Government, liability of—Garnishee order—Attachment of money due to plaintiff under contract with Government officer—Payment by Government under garnishee order—Voluntary payment—Common Law Procedure Act of 1857 (20 Vic. No. 31), ss. 27, 29, & 31.

Feb. 24.
July 25.

To a declaration for work and labour done by the plaintiff for the Government at their request, the nominal defendant pleaded that the money had been attached by a Judge's order, and paid by the Government under a garnishee order to a judgment creditor of the plaintiff. To this plea the plaintiff demurred, on the ground that the garnishee sections of the *Common Law Procedure Act of 1857* did not extend to debts due by the Crown; and that the protection afforded by s. 31 of that Act did not extend to payment under an order made without jurisdiction. Replication, that the debt arose out of a contract made with one Bennett, Commissioner for Roads, on behalf of the Government; that the money was attached in his hands, and the garnishee order made as against him; and that the Government were not made a party to the order. To this the defendant demurred, on the ground that the Government and Bennett were bound to obey the Judge's order, unless reversed; and that they were protected under s. 31.

The C.J.
Faucett J.
and
Innes J.

Held, that the orders, having been made as against Bennett, were founded in error, as Bennett was not personally liable for the money; that the Government were not bound by these orders; and, therefore, the payment of the money by the Government was a voluntary payment, and one which could not be relied upon as a defence to the action. Judgment for the plaintiff.

CROSS DEMURRERS :

DECLARATION : John Connolly sues the Honourable William John Lyne, who has been duly appointed by the Governor with the advice of the Executive Council, under the provisions of the

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Claims against the Colonial Government Act, nominal defendant on behalf of the Government of New South Wales, in respect of the claim of the plaintiff hereinafter set forth for money payable by the said Government to the plaintiff for work done and materials provided by the plaintiff in and about clearing of a public road from Milson's Downfall to the Queensland border, and otherwise for the said Government at its request, and for money paid by the plaintiff for the said Government at its request, and for interest upon money due from the said Government to the plaintiff and forborne at interest by the plaintiff to the said Government at its request, and for money found to be due from the said Government to the plaintiff on accounts stated between them. And the plaintiff claims 100%.

PLEAS : 1. Never indebted ; 2. Payment ; 3. That before the commencement of this suit, J. G. Dickson and J. W. Dickson had jointly recovered a judgment against the plaintiff in this Honourable Court, upon which judgment the said J. G. Dickson and J. W. Dickson recovered against the plaintiff a sum exceeding the amount of the plaintiff's claim herein sued for ; and on the 13th day of February, 1886, the said J. G. Dickson and J. W. Dickson obtained an order from one of the Judges of this Honourable Court, under the provisions of the statute, 20 Vic. No. 31, attaching the debt herein sued for, and calling upon the said Government to shew cause why they should not pay to the said judgment creditors the amount of the said debt then accruing, due from the said Government to the plaintiff, then being such judgment debtor as aforesaid, and afterwards, by an order dated the 20th of February aforesaid, the said Judge ordered that the amount of the said debt should be paid by the said Government to the said judgment creditors, and in default that execution might issue for the same ; and the said orders were duly served upon the said Government, and payment of the amount of the said debt was demanded, and the said Government, in compliance with the said orders, paid the said debt to the said judgment creditors, whereby the said Government was discharged from the liability to the plaintiff in respect of the same.

REPLICATION : 1. Joinder of issue ; 2. And, for a second replication, being a replication to the defendant's 3rd plea, the plaintiff says that before and at the time of the making of the orders therein mentioned, one W. C. Bennett was the Commissioner duly appointed under the provisions of the *Main Roads Management Act*, and that the debt herein sued for arose out of a contract made by the plaintiff with the said W. C. Bennett as such Commissioner, for and on behalf of the said Government, and not otherwise, and that by the said order of the 13th day of February, 1886, the said W. C. Bennett was called upon to shew cause why that he should not pay to the said judgment creditors the amount of the debt herein sued for, and that, by the said order of the 13th February aforesaid, it was ordered that the said W. C. Bennett should pay to the said judgment creditors the amount of the said debt ; and the plaintiff says that save as aforesaid the said Government was not called upon to show cause or ordered to pay the said debt, as in the said plea alleged, or was otherwise a party to the making of the said order.

DEMURREE to the third plea, the points marked for argument being :—1. That the garnishee sections of the *Common Law Procedure Act* of 1857 do not extend or apply to debts due by the Crown or the Government of this colony, and that the payment set up in the said plea was a voluntary payment, and is no answer to the plaintiff's claim ; 2. That the protection afforded by the 31st section of the said Act to garnishees paying under orders of the Court does not extend to payments under an order made without jurisdiction ; 3. That the plea confesses but does not avoid the plaintiff's cause of action.

JOINDER of issue, and joinder in demurrer.

DEMURREE to the second replication ; the points marked for argument being :—That the order admitted to have been made by the said replication was a good and valid order, and that the Government and the said W. C. Bennett were bound to obey the said order, unless rescinded or set aside, and that the said order afforded protection to the said Government and to the said W. C. Bennett from having again to pay the said debt.

G. Knox, for the plaintiff, in support of the replication, and of

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the demurrer to the plea. First, the sections of the *Common Law Procedure Act* of 1857 (20 Vic. No. 31) as to garnishee orders do not apply to the Crown, or to public officers, in respect of money due by the Crown to a judgment debtor. It has been so decided in Victoria under s. 201 of their *Common Law Procedure Act* of 1865 (28 Vic. No. 274), which, like s. 27 of our Act, is taken verbatim from the Imperial statute, 17 and 18 Vic., c. 125, s. 60: *Aitkin v. Godkin* (1). The words of s. 27 (2) can bear no other construction. By that section a Judge may order the attachment of debts owing or accruing to a judgment debtor from "any person . . . within the jurisdiction." How can this designation possibly include the Crown? Secondly, the order was not good as against Bennett, for he would not be personally liable on a contract made by him as a public officer: *Rossiter v. Dawson* (3).

[SIR G. INNES, J. We had no *Claims against Government Act* then. By that Act the Government or the Crown can now be sued as a private individual. Does s. 27 do more than provide a short cut to obtain payment of money for which the person entitled might otherwise sue?]

[FAUCETT, J. The garnishee order was made upon Mr. Bennett, the Commissioner for Roads. The money was due to the plaintiff, and the Government appropriated it, and handed it to Bennett to pay the plaintiff.]

(1) 4 W.W. & A'B. (L.) 216; Vic. Dig. Col. 63.

(2) *C. L. P. Act*, 1857 (20 Vic. No. 31), s. 27:—It shall be lawful for a Judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge, or such officer of the Court as such Judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

(3) 1 S.C.R. 55.

[The CHIEF JUSTICE. But Bennett did not *owe* any money to the plaintiff.]

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I contend that this payment by the Government under the garnishee order was a mere voluntary payment, and therefore can be no answer to the action.

Salomons, Q.C. (*O. B. Stephen* with him), for the defendant, shewed cause. The plaintiff had a valid judgment against him by a Court of competent jurisdiction; and the Government in complying with the garnishee order have satisfied that judgment. Assuming that the Court had no jurisdiction to make the garnishee order, the mere fact of payment under that order will protect the garnishee, otherwise there will be injustice. It is expressly provided by s. 31 (4) that payment made under a garnishee order shall be a valid discharge.

[The CHIEF JUSTICE. But unless the Court has jurisdiction—first, over the subject matter, and, secondly, over the person—is not the order null and void ?]

The plaintiff having a cause of action against the Government under the *Claims against Government Act* (39 Vic. No. 38), the Government, having paid the money to a judgment debtor of the plaintiff, are discharged from further liability.

[FAUCETT, J. The Crown may submit to be bound by any Act of Parliament.]

How can this Court, which yesterday ordered us to pay the money to the judgment creditor, to-day order us to pay it over again to the plaintiff, the judgment debtor. In *Wood v. Dunn* (5), it was held that a garnishee, who had paid money to a judgment creditor after the judgment debtor had executed a trust deed for the benefit of his creditors under the *Bankruptcy Act* of 1861, was protected from liability to the trustees by the

(4) 20 Vic. No. 31, s. 31 :—Payment made by, or execution levied upon, the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.

(5) L.R. 2 Q.B. 73.

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payment as made under an order of a Court of competent authority. *Channell*, B., delivering the judgment of the Court in that case, said (at page 81) : " It will be necessary to examine the cases decided as to the effect of these garnishee orders, and see whether we find anything in them which induces us, sitting in a Court of error, to decide in opposition to the broad principle of protecting honest payments made under competent authority." So here we were bound to obey the order of the Court.

[The CHIEF JUSTICE. Not if the Court had no jurisdiction to make the order.]

Channell, B., also refers in *Wood v. Dunn* (5), at p. 80, to the principle laid down by *Grose*, J., in *Allen v. Dundas* (6), viz. :— " That the law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a Court having competent jurisdiction." Courts of general jurisdiction are competent to make such orders under ordinary circumstances. Jurisdiction means their actual jurisdiction ; e.g., the jurisdiction of the District Court up to 200*l*.

[The CHIEF JUSTICE. Then it comes to this, that, although the Crown is not bound by the *Common Law Procedure Act*, nevertheless the Court can bind the Crown by it.]

We say that the Crown is bound by that Act. The word "garnishee" in s. 30 means the person made a garnishee by the Court. S. 31 contemplates the very fact of the order being wrongly made.

[SIR G. INNES, J. Is not the whole purview of the *Claims against Government Act* discussed in *Bowman v. Farnell* (7).]

In *Allen v. Dundas* (6), the defendant had paid money, due to a deceased person, to an executor under probate granted to him of a will which turned out to be a forgery ; and the payment was held to be a discharge.

[The CHIEF JUSTICE : If the Supreme Court of Victoria made an order against the Government here, and the Government paid the money, would that be a good payment ?]

The case is not analogous.

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[The CHIEF JUSTICE: Supposing the *Common Law Procedure Act* does not bind the Government, would not an order under that Act be just as inefficacious as an order of a foreign Court?]

Yes; but for s. 31 (4). A Court of competent jurisdiction is a Court competent to make such order.

Secondly, apart from the Act, suppose the case of payment under a judgment that never existed. Suppose the Court order A., who is indebted to C., to pay B. the amount of a judgment debt owing by C. to B., and it turns out that C. never owed B. anything, and that the order was wrong, would A. be liable to pay C. over again, after having paid B. under an order of the Court? In *Culverhouse v. Dickens* (8), A. having signed a judgment against B. (a solicitor) obtained a garnishee order against C., who owed B. a bill of costs. C. obtained further time for taxing the bill on payment into Court of 25*l.* Before taxation, B. executed a composition deed, and gave notice to C. not to pay the amount of the bill to A. On application by C. for the repayment to him out of Court of the 25*l.*, it was held that the payment into Court was within s. 65 of the *Common Law Procedure Act* of 1854, and discharged C. as against B., and that A. was entitled to the 25*l.* If money were paid to a person not a judgment creditor, the garnishee could recover the money as money had and received to his own use. That is the only possible hardship that could arise. The Supreme Court being a Court of competent jurisdiction to make such orders generally, and having made an order in this case, our obedience to that order is a valid discharge as to an ordinary garnishee under s. 31.

[*Knox*. Even if the plea is good, the replication can stand. The order was made against Bennett, and was not an order against the Government. The plea admits that the order is good.]

We say that whether the order was right or wrong, our compliance with it exonerates us. As to the replication, suppose

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Bennett had paid the plaintiff, could the plaintiff then have sued the Government? Would it not be a good plea that the plaintiff never contracted with the Government, but with Bennett, and that Bennett paid him? Assuming that the order against Bennett was a nullity, the fact of payment operates as a valid discharge. Is the liability of the Government to be revived because they have chosen to waive the point that the order was irregular? In *Evans v. Stephen* (9), where the question was whether the defendant, an official assignee, had properly paid over under a garnishee order certain dividends in an insolvent estate, *Faucett, J.* (at p. 159), said, in reference to s. 31: "It appears to me that by that payment Stephen was discharged as against anyone claiming the money. . . . I think it (s. 31) was intended to be a substantial protection for anyone paying the sum specified in the order." Again, suppose a garnishee order were made against an agent by mistake, execution could not issue against the principal.

[FAUCETT, J. Suppose the principal paid money, thinking that it was due, and it turned out that it was not owing by the agent?]

He could succeed on a plea on equitable grounds.

[THE CHIEF JUSTICE. Suppose a principal pays a debt where the garnishee order is against his agent?]

Then if the principal were sued on the contract made by the agent, a plea of payment would be good.

Knox, in reply. The assumption that s. 31 applies to the Crown is a fallacy. "Such garnishee" means a "garnishee" under s. 27. If s. 27 does not apply to the Crown, s. 31 cannot. Why is protection given to the garnishee? Because he is compellable to pay. If the Crown is not compellable, the reason is gone, and it becomes a voluntary payment. As to the case of *Allen v. Dundas* (6), in which payment was made under probate, such an order would be good until the will is set aside. It is a wholly different case. Here the Court makes an order without jurisdiction. There is no ground on which it can be said that

the payment is a valid payment. The Crown is not bound by the *Common Law Procedure Act*, as this Court has held in *Wilson v. The Minister for Works* (10), and *Anderson v. Stuart* (11), that a discovery order cannot be made against the Government.

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Cur. adv. vult.

On July 25th, the judgment of the Court was delivered by

July 25.

The CHIEF JUSTICE :—The defendant in this case, when the suit commenced, was the Minister for Public Works, and was nominated as a defendant under the *Claim against the Colonial Government Act*. The declaration is for work and labour performed by the plaintiff for the Government at their request. The third plea states that before the commencement of this suit certain persons named Dickson had recovered a judgment against the plaintiff for a sum exceeding the amount of the plaintiff's claim in this suit ; that on the 13th February, 1886, the Messrs. Dickson had obtained an order from one of the Judges of this Court, under the provisions of the 20th Vic. No. 31, attaching the debt sued for, and calling upon the Government to shew cause why they should not pay the Messrs. Dickson the amount of the said debt then accruing due from the Government to the plaintiff ; that on the 20th February, 1886, the said Judge by a further order directed the said debt to be paid by the Government to the Messrs. Dickson, and that in default execution might issue against the Government for the same ; and that these orders were served upon the Government, who in compliance therewith paid the said debt to the Messrs. Dickson, whereby the Government were discharged from all liability to the plaintiff in respect of the same. This plea was demurred to upon the ground that the garnishee sections of the *Common Law Procedure Act of 1857* do not extend to debts due by the Crown or by the Government of the colony, and that the protection afforded by the 31st section of the *Common Law Procedure Act* does not extend to payment under an order made without jurisdiction. The plaintiff also replied to the effect that before the making of the order one W. C. Bennett was the commissioner duly appointed under the provisions of the *Main Roads Management Act*, and that

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the debt sued for arose out of a contract made by the plaintiff with Bennett, as such commissioner, for and on behalf of the Government; that by the order of the 13th February, Bennett was called upon to show cause why he should not pay to the Messrs. Dickson the amount of the debt sued for—that by the order of the 20th February it was ordered that Bennett should pay to the Messrs. Dickson the amount of the said debt and that, save as aforesaid, the Government were not called upon to show cause or to pay the said debt, or were otherwise a party to such order. The defendant demurred to this replication upon the ground that the orders were good and valid, and that the Government and Bennett were bound to obey them unless reversed, and that such orders afforded protection to the Government and Bennett. It appears, then, from the case so presented on the pleadings that Bennett, as Commissioner for Main Roads, appointed, we presume, under the provisions of the 21st Vic. No. 8, and acting for the Government, entered into a contract with the plaintiff, under which contract certain money became payable to the plaintiff, and which money was, under the 10th section of the 21st Vic. No. 8, a charge on the Consolidated Revenue. It further appears that the Messrs. Dickson, having obtained a judgment against the plaintiff, had applied to a Judge under the 27th section of the *Common Law Procedure Act* of 1857 for an order to attach money in the hands of Bennett. Now, this order could only be granted on the assumption that Bennett was personally indebted to the plaintiff, which was not the case; and therefore, as against Bennett, the order was founded in error—see *Gidley v. Lord Palmerston* (2 Brod. and Bing. 275). The Government, however, treated this order against Bennett as being an order against the Crown; and the Government, after a further order had been obtained under the twenty-ninth section of the Act, and which also was founded on the erroneous assumption of a debt being due by Bennett, made the payment to the Messrs. Dickson which the latter had taken these proceedings to obtain. It is not necessary in this case to consider whether the sections of the *Common Law Procedure Act* of 1857 relating to the attachment of debts apply to the Crown, and indeed it was not argued that they did, but it was contended

that the orders in question were in effect orders against the Crown, that the Government having paid the amount directed to be paid are thereby protected, and the cases of *Allen v. Dundas* (3 Term Reports 125) and *Wood v. Dunn* (2 L.R. Q.B. 73), were relied upon to establish the proposition that the law will never compel a person to pay a sum of money a second time which he had previously paid under the sanction of a Court having competent jurisdiction. We entertain no doubt that the law as laid down in these cases is correct, but it is quite inapplicable here. How can it be said that the payment made by the Government was one made under the sanction of a Court? The Government were no party to the suit, nor were they made a party by any subsequent proceedings, and therefore the payment made was not made under the order or with the sanction of any Court. The Government were not bound, or indeed entitled, to take any notice of these orders, and the payment made thereunder was just as much a voluntary payment as if the Messrs. Dickson had been paid without any order obtained. This being so, we are of opinion that the Government cannot shield themselves in this action under the order made against Bennett, and that the payment by the Government of the sum due to the plaintiff was a voluntary payment, and one which cannot be relied upon as a defence to the action. For these reasons we are of opinion that the replication demurred to is a sufficient answer to the plea, and that upon this record judgment must be given for the plaintiff.

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Judgment for plaintiff.

Attorney for plaintiffs : *J. Dwyer.*

Attorney for defendant : *Williams, C.S.*

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In re PARRY.

Feb. 15. *Crown Lands Act, 1884, ss. 21 (ix.), 29, 54, 71 and 74—Application for conditional*
 July 25. *lease—Leasehold area—"Alienated land" in s. 74—"Available" land in s. 29*
—Conditional sales and conditional leases on same footing.

The C.J.
Faucett J.
 and
Innes J.

After the passing of the *Crown Lands Act* of 1884, and within the period prescribed by s. 54, Parry, a conditional purchaser on Pitt's run, applied for a conditional lease of adjoining land. Pitt had lodged his application for a pastoral lease within the period prescribed by s. 71. The notification of the division of the run was gazetted before Parry's application for a conditional lease came on for hearing before the Local Land Board; and the land, the subject of his application, was situated within that portion of Pitt's pastoral holding which the Minister determined should be the pastoral area. The Land Board confirmed Parry's application.

Held (on appeal under s. 140), reversing the decision of the Land Board, that the mere application for a conditional lease confers no right as against the pastoral lessee; and that the right of the pastoral lessee, who by the notification became entitled to a pastoral lease of the leasehold area, must prevail.

Held, also, that a conditional lease being an inchoate conditional sale (s. 50), a notified leasehold area is exempt from conditional lease as from conditional sale under s. 21.

By s. 29, "if upon the report of such surveyor it shall appear that the land is available, then the Board shall confirm the application, &c."

Held, that the word "available" refers to land that is available at the time of the inquiry by the Land Board, does not relate back to the date of the application.

Per Curiam. The words "alienated land" required by s. 74 to be marked on the plan of a pastoral holding, are not synonymous with the expression "lands granted by the Crown in fee," and must be taken to include land held under pre-emptive lease, and all land alienated as far as the pastoral lessee is concerned.

SPECIAL CASE stated by the Minister for Lands (Copeland), under s. 140 of the *Crown Lands Act* of 1884:—1. On the 1st day of September, 1882, Reuben Parry became the conditional purchaser of a piece of land of the area of 640 acres, situate in the parishes of Meroe Giri and Jield, central division of the land district of Moree. 2. On the 28th February, 1885, the said Reuben Parry, being still the owner of the said conditional purchase and residing thereon, applied for a conditional lease of 1920 acres under the 54th section of the *Crown Lands Act* of 1884, in virtue of his said conditional purchase. 3. The said application was duly made, and there was Crown land available

for the purposes of the application. 4. On the 28th October, 1885, the said application came before the Local Land Board, at Moree, for adjudication, and the said Board, having inquired into the matter of the said application, confirmed the said application. 5. Against this decision, George Matcham Pitt, junior, the lessee of the run, appealed to the Minister for Lands upon the following grounds :—" That it was proposed to grant the said conditional lease out of the leasehold area of the said George Matcham Pitt, junior, which was duly notified in the New South Wales Government *Gazette* of the 11th July, 1885."

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The questions desired to be submitted for the opinion of this Honorable Court are : 1. Whether the decision of the said Land Board was right in point of law. 2. Whether (as the said applicant complied with the provisions of s. 54 of the Act, by lodging his application for a conditional lease within the period of 90 days prescribed therein) his right under that section (which is to be dealt with similarly to one under the 48th section) is not preserved until such application is disposed of by the Land Board. 3. Whether the subsequent division of the run can deprive the said applicant of his statutory right to a conditional lease in the event of the land being located by such subsequent division on that side of the dividing line designated the leasehold area.

E. Barton, for the appellant.

Salomons, Q.C., and *C. B. Stephen*, in support of the decision of the Land Board.

The case was argued first on Aug. 26th, 1886, before Sir James *Martin*, C.J. and Sir George *Innes*, J. Sir J. *Martin*, C.J., died before the judgment of the Court was prepared.

The case came on for argument a second time, on Feb. 15th, 1887. Feb. 15.

Salomons, Q.C. (*C. B. Stephen* with him), for the Crown, appeared in support of the decision of the Land Board. *Parry*, being a conditional purchaser under the old Act, had to make his application for a conditional lease within 90 days. This was done on the 28th Feb., 1885. Pending the decision of the

1887. Board on that application, the notification of the division of Pitt's run was published in the *Gazette* under s. 76, on the 11th July, 1885. The Land Board, on the 28th October, 1885, confirmed Parry's application. It is now contended, that under s. 21, subs. III., the land was not open to selection, and, therefore, not open to conditional lease. But ss. 50 and 54 show that the two tenures are distinct.

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[SIR G. INNES, J. In *Edols v. Tearle* (1), and other cases, "sale" was taken as interchangeable with lease.]

The application being made within the 90 days, gave the applicant a right which no subsequent act of the pastoral lessee can take away.

[The CHIEF JUSTICE. Under s. 74, it is the Minister who determines the division of the run.]

Yes; but under s. 71 the dividing line must be drawn by the run holder.

[FAUCETT, J. The question is, can the subsequent division take away the incipient right acquired by the applicant for a conditional lease?]

Under the old Act, the selector had a pre-emptive right to a lease; and, though now he cannot claim a lease as against the Crown, but must make an application for it under s. 54, that section gives him a right to apply on the fulfilment of certain conditions, and if he has fulfilled those conditions, he acquires a right which no subsequent division can avoid.

[The CHIEF JUSTICE. Under s. 74, does not all land become leasehold area, that is not marked on the plan as alienated?]

This was not alienated land, and could not be marked on the plan.

Barton, for Pitt, the pastoral lessee. The question is, was the

land applied for Crown land at the time of the division of the run? If it was, being included in that part of the run declared by the Minister to be the leasehold area, the runholder is entitled to it. The land must be "available" (s. 29) before the Board can confirm an application for a conditional lease. Here the inquiry took place after the division of the run, and, therefore, the land was not "available." Until the land is allotted (s. 48) an applicant for a conditional lease has no title. S. 26 contains no provision like that of s. 13 of 25 Vic. No. 1, by which, on tendering an application to the land agent, a person was at once declared the conditional purchaser. By s. 28 of the Act of 1884, all applications must be dealt with by the Board; therefore, until confirmed, they confer no title. By s. 29, "if upon the report of such surveyor it shall appear that the land is 'available,' then the Board shall confirm the application." When? When the Board meet to allot the land under s. 48. If at that time the land is in the leasehold area it cannot be "available."

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[FAUCETT, J. It amounts to this: Can the lessee divide the run pending such an application?]

By s. 75, subs. IV., in the case of small runs the Minister may declare the whole area a leasehold area.

Salomons, Q.C., in reply. Lands comprised within notified leasehold areas, being expressly exempted from conditional sale by s. 21, cannot, by implication, be said to be closed to the conditional leaseholder. A conditional sale and a conditional lease are two distinct things. By s. 50, a conditional lease can be turned into a conditional sale.

[The CHIEF JUSTICE. In s. 21, subs. IX., they are classed together.]

[FAUCETT, J. If the Act is designed to keep pastoral leasehold areas free from invasion, your interpretation would nullify one of the main intentions of the Legislature.]

The Court cannot, on the ground of public policy, include conditional leases with conditional sales when the Act expressly

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distinguishes between them. The time when the land is available is when the application is made. During the whole 90 days the land is open ; the applicant having acquired an inchoate right on making his application.

[The CHIEF JUSTICE. Section 74 seems to me to show that all land not marked on the plan as alienated must become part of the leasehold area. The object of that section is that the Minister may know what land is available for the leasehold area.]

Cur. adv. vult.

July 25.

On July 25, the judgment of the Court was delivered by

The CHIEF JUSTICE. This is a case submitted to the Court by the Minister for Lands under the provision of the 140th section of the *Crown Lands Act* of 1884, and it raises a point of considerable importance. It appears that Mr. Parry, the applicant for the conditional lease, became the conditional purchaser of certain land on September 1, 1882, and, therefore, under the law in force before the passing of the Act now under consideration. After the passing of the Act of 1884, and within the period prescribed by the 54th section, Mr. Parry lodged with the land agent an application for a conditional lease adjoining, and in right of his conditional purchase. On October 28th, 1885, this application came before the Land Board for their consideration under the provision of the 29th section of the Act, and it was thereupon confirmed. In the meantime Mr. Pitt, who was the leaseholder of the run upon which the conditional purchase was situated, duly complied with the requirements of the 71st section of the Act, and the Minister under the powers of the 74th section duly notified to Mr. Pitt which part of his run or pastoral holding was to be the pastoral lease, and a notification of the division of the run was on July 11, 1885, notified in the *Gazette*. It appeared that the conditional lease applied for was on that portion of the pastoral holding which the Minister determined should be the pastoral lease. It will be seen, therefore, that Mr. Pitt became entitled to a pastoral lease before the application of Mr. Parry for a conditional lease

came on for consideration before the Land Board. Mr. Pitt has appealed from the decision of the Land Board of October 28th, 1885, and the Minister has stated this special case for the opinion of the Court. This state of facts gives rise to the following questions :—First : Did Mr. Parry obtain any right to the land by virtue of his application for a conditional lease ; and if so, was this right of such a nature that the land could not subsequently be included within a pastoral lease ? Second : Are pastoral leases subject to have conditional leases taken there-out at any time ; or are the lands included in such leases as exempt from being conditionally leased as they are from being conditionally purchased ?

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First : By the 71st section the runholder is to furnish with his application to the Minister for a pastoral lease a plan of his pastoral holding showing, amongst other things, all land held or occupied by him under any tenure other than pastoral lease, and by the 74th section the Minister is to “cause to be marked upon such plan all portions of alienated land not already shown thereon ;” after doing which he is to notify to the runholder which part of the run is to be the pastoral lease. It appears to us that the object of doing this is to define clearly what is the land which is to come under the pastoral lease, so that the pastoral lessee may know of what land it is he is to remain in undisturbed possession. The words “alienated land” in the 74th section are not, in our opinion, synonymous with “lands granted by the Crown in fee,” but mean something more extensive, and will, for instance, include lands held under pre-emptive lease at the time of the passing of the Act ; such lands, although not alienated in fee from the Crown, are alienated so far as the pastoral lessee is concerned, and should, therefore, be shown upon the plan in question, as should also all other land which the Crown are not then in position to place in the immediate possession of the pastoral lessee. Now it is quite clear that the land for which Parry applied could not be marked upon the plan of this run as alienated land, there being at the time no lease or even a promise of a lease then existing—nothing but an application which might or might not be confirmed. Again, by section 54, a conditional purchaser under any of the

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repealed Acts has 90 days within which to apply for a conditional lease. By section 71, the runholder has 120 days within which to lodge his written application for a pastoral lease. If each has an inchoate right, why should the runholder who exercises his right within the prescribed time be in a worse position than the conditional purchaser, who also merely exercises his right within the prescribed time? We are, therefore, of opinion as between these two classes of lessees, the pastoral and the conditional, that the mere application for a conditional lease confers no right as against the pastoral lessee, and that the right of the pastoral lessee, who by the notification became entitled to a pastoral lease of the leasehold area, must prevail. An argument has been founded upon the word "available" in the 29th section, and it is contended that if the land was available at the date of application the confirmation of the Land Board relates back to the date of application. We are of opinion that this argument cannot prevail. The word "available" in this section refers to what may appear to the Board when considering the surveyor's report, and if the land appear to be then available confirmation is to be made, but not otherwise.

The second ground of contention is that the 21st section of the Act, which exempts leasehold areas notified under the provisions of Part IV. of the Act from conditional sale, does not exempt them from conditional lease, and therefore such lands are open to be conditionally leased at any time. It is, therefore, necessary to consider what a conditional lease really is. The 50th section of the Act provides that, on the expiration of five years from the date of the confirmation of an application for a conditional lease, upon the fulfilling of the conditions, the conditional purchaser shall have the right of conditionally purchasing the land held under conditional lease. It appears to us, therefore, that a conditional lease is in its very inception an inchoate conditional sale, and that lands which are exempt from conditional sale must be equally exempt from conditional lease. It will be observed also that the last proviso to sub-clause 9 of section 21 places conditional sales and conditional leases upon the same footing. We are of opinion, therefore—first, that the decision of the Land Board was wrong in point of law; second

and third, that a mere application for a conditional lease, which has not been confirmed at the date of the notification of the pastoral lease in the *Gazette* confers no right as against the pastoral lessee.

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The C.J.

Appeal allowed. Cost to be paid by the Crown.

Attorney for appellants: *O. B. Pitt.*

[NOTE. The Chief Justice, having been consulted by the Prothonotary as to the order for costs, directed that the matter should be mentioned again in Court.]

Re LETHBRIDGE *v.* MITCHELL.

May 27.
July 25.

Real Property Act (41 Vic. No. 18), s. 4—Caveat—Directing issues—Discretion of Court—Former actions of ejectment.

In 1869, John and George Lethbridge applied to bring certain lands under the *Real Property Act*, alleging a title by possession for more than 25 years. Before this, one S. had applied to bring the same land under the Act, setting up a documentary title, which was rejected by the examiners of titles. In 1876, S. conveyed the land to M. (the present caveator), who brought ejectment. The defendants in that action (the present applicants) admitted M.'s *prima facie* documentary title, but proved in themselves, as against such documentary title, a possessory title to the satisfaction of the jury, and obtained a verdict. A rule to set aside that verdict having been refused, M., in 1878, began a fresh action of ejectment, which he discontinued in the following year, whereupon the applicants signed judgment. They subsequently renewed their application for a certificate of title, and their title having been passed, and the application advertised, M., on March 25th, 1887, lodged his caveat, and on May 28th filed his case, asking to have an issue directed to determine whether the applicants were entitled to the land by possession as claimed by them.

The C.J.
and
Faucett J.

Held (on motion for an order for the withdrawal of the caveat), that the caveat must be withdrawn, on the ground that the caveator would, under the circumstances, be restrained in Equity from trying the issue if directed.

Held, also, that s. 4 is not mandatory upon the Court to send any issue, that may be raised, for trial; but that it is for the Court to say in each case whether there are facts *bond fide* in contest between the parties.

MOTION on notice for an order directing the withdrawal of a caveat lodged by Mitchell against an application by John and George Lethbridge to bring certain lands under the *Real Property Act*.

Donovan, for the applicants, in support of the motion, stated the facts, which sufficiently appear from the head-note and the judgment.

1887. *G. Knox*, for the caveator. The verdict in the former case does
Re not operate as an estoppel.
 LETHBRIDGE

v.
 MITCHELL. [FAUCETT, J. Is not that so now that ejectment is brought by
 the plaintiff himself, and not by a feigned issue ?]

[The CHIEF JUSTICE. In *Doe d. Strode v. Seaton* (1), Lord Abinger, C.B., said : " A judgment in ejectment is not conclusive evidence, because a party may have a title to possession, and to grant a lease at one time and not at another ; but it is clearly admissible in evidence."]

Here the fact that the applicants have acquired a title by possession is asserted by them and denied by us.

[FAUCETT, J. It is a monstrous doctrine that when a defendant, who has succeeded twice in ejectment against a plaintiff, comes in to get his title, the former plaintiff should be allowed to come in after nine years, and have the issue tried over again.]

The *Common Law Procedure Act* protects the defendant. The plaintiff must pay the costs of the former actions. The verdict establishes nothing as to the defendant's title ; but merely that the plaintiff was not entitled to possession. The defendant's title was not in issue at all. The question was merely whether the plaintiff's title was established. We are not estopped ; and the Court is bound, under s. 4 of 41 Vic. No. 18, to direct the issue to be tried. Evidence may be forthcoming which was not procurable at the former trial.

Donovan. It is for the Court to determine whether there is *bonâ fide* anything really in issue.

[The CHIEF JUSTICE. There is jurisdiction in Equity to quiet a title when a second action is brought.]

In 1869, we swore to 25 years' possession, and the jury found a verdict in our favour. The meaning and intention of s. 4 is that the Court shall decide whether there is *bona fides*. In *Re*

Doust (2), the caveator was not allowed to impugn generally the applicant's documentary title, which had been passed by the examiners, and was limited to a specific traverse of particular documents. So, in this case, the applicants' title having been established by the verdict of a jury as between the present parties, the caveator should not be allowed in a general way to dispute the applicants' title so established. To show the futility of any further trial on that same question of possession, it is obvious that it would be easier now to establish our possessory title, as instead of going back 20 years from 1869, we should only have to go back 20 years from the present time. The object of the Act is to give indefeasible titles. The second action by the caveator was discontinued. To try this issue again would only be a waste of time. Besides, it is clearly a case in which a Court of Equity could interfere, under the circumstances, to put a stop to further litigation on the question of title between the parties.

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[The CHIEF JUSTICE. I feel that difficulty. If the Court is bound to allow this issue as to possession to be again raised you could go into Equity to restrain the caveator from further disputing your title.]

Knox. If the Court will settle the issue, I will take the risk of getting it stopped in Equity.

[The CHIEF JUSTICE. But if the Equity Court has that power, ought we to direct the issue? I cannot dictate to the Primary Judge, but I may express my opinion that he ought to stay these proceedings at once. Are our hands so tied that we must make a formal order here, and so send the parties into Equity to get their rights? It seems to be clearly a case in which a bill of peace would be entertained. In *Devonsher v. Newenham* (3), Lord Redesdale, Lord Chancellor of Ireland, said: "Wherever one person claims title against another, who is in possession, and the enjoyment by that person is disturbed, and he is put into a situation where he cannot have that enjoyment as he ought in conscience to have it, there are cases where, for the purpose of quieting the possession, a suit

(2) 2 N.S.W. L.R. 299.

(3) 2 Sch. & Lefroy, at p. 208.

1887. is entertained. For example, where several ejectments have been brought in succession, and a bill is filed to quiet the possession, and prevent perpetuity of suits, upon which the Court can decree a perpetual injunction, such a bill will be entertained." We will consider whether we are compelled under the Act to order this issue.]

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The arguments were heard on May 27th.

July 25. On July 25th, the judgment of the Court was delivered by

The CHIEF JUSTICE. In this case the Court was moved by Dr. *Donovan*, on behalf of the applicants, for an order directing the caveator to withdraw his caveat. The matter came on for hearing before his Honour Mr. Justice *Faucett* and me on the 27th of May last, and as the counsel for the caveator insisted that, the caveator having, in obedience to an order of the Court, stated his case, the Court had no jurisdiction to make the order asked for, but must direct an issue to be tried by a jury—we reserved our judgment for the purpose of considering whether such a proposition could be sustained.

The facts appear to be as follows :—About 18 years ago, that that is to say on the 16th September, 1869, the applicants lodged their application to bring two blocks of land of 640 acres each, being the land in question, under the provisions of the *Real Property Act*, at that time alleging a title by possession of 25 years and upwards. Before this application was made, one Thomas Ware Smart had also applied to bring the same land under the Act, setting up a documentary title commencing with grants from the Crown to one Samuel Terry Hughes. The Examiners of Titles reported against Smart's title, and the commissioners thereupon rejected it. Against their decision Smart did not appeal, but on the 14th of July, 1876, he executed a conveyance of these two blocks of land to the caveator. The caveator soon afterwards, relying upon the documentary title thus acquired, commenced an action of ejectment against the applicants, which action was tried in Sydney before the late Chief Justice, Sir James *Martin*, on the 16th and 17th days of May, 1878, when the applicants, having set up and established to the satisfaction of the jury their possessory title, obtained a

verdict. The caveator thereupon applied to the Full Court for a rule *nisi* to set aside this verdict, and this rule was on the 8th of June, 1878, refused. The judgment of the Court on the argument for this rule *nisi* will be found reported in the 1 S.C.R. N.S., page 62. In the same month the caveator commenced a fresh action of ejectment. The applicants appeared, and the case was set down for trial, but in November, 1879, the caveator served notice of discontinuance, whereupon the applicants signed judgment against the caveator, this being the second judgment they had obtained against him in regard to these lands. During these proceedings, the matter was in abeyance, but after the second judgment the applicants renewed their application, the examiners approved of their title, and the commissioners passed the same. The usual advertisements were then issued, and the caveator on the 25th of last March lodged his caveat. It then became necessary, under the provisions of the 41st Vic. No. 18, section 4, for the applicants to state their case, which was filed on the 6th of May, and on the 10th of May an order was obtained that the caveator should file his case, which he did on the 26th May, and by this case he asks to have an issue tried to determine whether the applicants are entitled to the lands or any part thereof by possession as claimed by them. This being the caveator's only contention, the present motion has been made, and has been resisted, as above stated. We are of opinion that the caveator should not be permitted to again litigate this matter, and that the caveat should be withdrawn. Mr. *Know*, for the caveator, relied upon the words of the 4th section of the 41st Vic. No. 18, following the provision in that section for the caveator stating his case; these words are:—"And the Court shall thereupon direct an issue or issues to be tried by a jury as to any fact or facts, or should no fact be in contest, may decide the matter upon the case stated, and for the purposes aforesaid may make all such orders as the Court shall think fit," and contended that this provision is mandatory upon the Court, that should the caveator by his case raise an issue, no matter of what nature, the Court is thereby rendered powerless, and must send this issue for trial. We are decidedly of opinion that this is not so, and that it is in each case for the Court to decide whether

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the case states any facts which are *bonâ fide* in contest between the parties. If the Court find there are no such facts, the Court must then decide the matter upon the case stated. Take the present case as an example. See how futile it would be for this Court to make an order sending the suggested issue for trial. If the Court did so, the applicants, if well advised, would most properly thereupon institute a suit in equity in the nature of a bill of peace (see 2nd Story Eq. Jur., section 859), praying for an injunction to restrain the caveator trying any such issue, and further praying that the caveator be directed to remove his caveat, and in such a suit in our opinion the applicants would be entitled to full relief, inasmuch as the applicants have been in possession of the land for a period of over 40 years, and the caveator has twice brought actions of ejectment against them, which resulted in judgments passing for the applicants. If ever there was a case where a Court of Equity ought, in our opinion, to interfere and grant a perpetual injunction to quiet the possession of the applicant and to suppress future litigation of their right, this is just the case, and yet it is contended that this Court must go through the farce of stating an issue as to the applicants' possession, which issue the caveator ought to be forthwith restrained from trying. We are of opinion that the hands of the Court are not tied in the way suggested, and that, as before stated, it is for the Court to say in each case whether there are facts *bonâ fide* in contest between the parties; if the Court find there are such facts, they must be sent for trial before a jury. In this case we are of opinion that there are no such facts in contest, and we, therefore, in accordance with the provisions of the Act, decide the matter upon the case stated, and direct that the caveat be forthwith withdrawn. The caveator must pay the cost of all proceedings since the filing of his caveat.

*Order : Caveat to be withdrawn
forthwith ; caveator to pay all
costs from filing of caveat.*

Attorneys for applicants : *Want, Johnson & Co.*

Attorneys for caveator : *Spain & Moors.*

CROSS v. GOODE.

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New trial—Weight of evidence—Opinion of Judge at trial—Verdict unsatisfactory, but not unreasonable and unjust—Improper admission of evidence—Independent evidence to support verdict—Practice—Memorandum—Signature of counsel.

Feb. 28.
March 2, 3.
July 25.

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and
Innes J.

Although the opinion of a Judge who tries a case is by no means conclusive, yet in determining whether a verdict is against evidence his opinion must be taken into serious consideration, and should form one of the elements upon which the Court is to base its determination.

It is not sufficient for the Court to say that on the evidence appearing on the Judge's notes, they would have come to a different conclusion; nor is it sufficient that the Court may think the verdict eminently unsatisfactory. In order to set aside a verdict as being against evidence, such verdict must be not only unsatisfactory, but unreasonable and unjust, and such as reasonable men ought not to have found.

The Court does not exercise the function of a mere appeal from a jury; and it is not the duty of the Court to go over the same ground as the jury, and reverse their decision, merely because it arrives at an opposite conclusion.

A new trial will not be granted on the ground of the erroneous reception of evidence, if such evidence is not material, nor if, though it be material, there is, independently of it, evidence to support the verdict. *Gordon v. The Bank of New South Wales* (7 N.S.W. L.R. 122) followed.

The filed memorandum for new trial need not be signed by counsel, who, by signing the draft, authorises the attorney to copy his signature.

NEW TRIAL MOTION. Action against a medical man for alleged negligence in not making a proper examination of an injury received by the plaintiff, a brickmaker, to the shoulder joint; for not discovering that it was a recent dislocation; and for not reducing this dislocation.

The trial took place before *Windeyer, J.*, and a special jury of 12, on the 25th, 26th, 29th, and 30th days of March, 1886. Verdict (by a majority) for the plaintiff: 500*l.* damages.

The evidence sufficiently appears, for the purposes of this report, from the judgment.

On May 3rd, 1886, a rule *nisi* was granted (*Sir J. Martin, C.J.*, and *Sir G. Innes, J.*, *Windeyer, J.*, dissenting) on the grounds: 1. That the verdict was against the evidence and the weight of evidence. 2. That his Honour the learned Judge erroneously admitted in evidence conversations between the wife of the plaintiff and one Rosenthal (a chemist employed as an assistant by the defendant), in the absence of the defendant.

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The rule was refused on the other grounds in the memorandum, one of which was that his Honour should have received the evidence of Joseph Palmer Abbott, which was tendered by the defendant before the conclusion of the case (a).

Wise for the plaintiff (respondent) took the preliminary objection that the memorandum filed was not *signed by counsel*, as required by Rule 5 of 19th August, 1861. He cited *Wakely v. Quinn* (1), and *Sempill v. Campbell* (2).

The Court, without calling upon counsel for the defendant, overruled the objection, on the ground that counsel, by signing the draft memorandum, authorised the placing of his signature on the copy filed (3).

Salomons, Q.C., *G. B. Simpson*, Q.C., and *Pring*, for the defendant in support of the rule. The verdict was one that no jury of reasonable men ought to have found: *The Metropolitan Railway Co. v. Wright* (4). As to the evidence, apart from the plaintiff's own admissions (according to the defendant) that it was an old dislocation, the fact that the glenoid cavity was partly filled up so as to prevent reduction, even under the pulleys, was conclusive evidence (as testified by Dr. MacLaurin, Dr. Creed, and others, who gave evidence for the defendant) that the dislocation was an old one; and it was agreed that the only question submitted to the jury was whether the dislocation was old or recent. The fact that the plaintiff had passed the medical examination for the militia, and had been in other employment which necessitated a free use of the upward movement of the arm, was not inconsistent with the existence of an old injury.

In the course of the arguments *Astley Cooper's* "Surgery," *Erichsen's* "Science and Art of Surgery," and *Pickering's* "Fractures and Dislocations" were referred to.

(a) This evidence was tendered after the close of the defendant's case, and after evidence had been called in reply: and was objected to. The gist of the evidence (to show that a person who in early life had a sub-coracoid

dislocation of the humerus, remaining unreduced, might have perfectly free use of his arm) having been by consent handed up in writing to his Honour, it was held to be inadmissible.

(1) 2 W. N. (N.S.W.) 28.

(2) 6 S.C.R. Eq. 1.

(3) See 3 W. N. (N.S.W.) 100.

(4) 11 App. Cas. 152.

[The CHIEF JUSTICE pointed out that medical books could only be used to refresh a witness's memory ; and that they must be read, not as evidence *per se*, but as part and parcel of the witness's testimony: *Taylor on Ev.* 1279-80, *Collier v. Simpson* (5). Therefore only the passages referred to at the trial could be now read to the Court.]

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As to the second ground, the evidence was clearly inadmissible. It must have had weight with the jury, as the plaintiff's counsel, in his address in reply, laid great stress on the fact that Rosenthal was not called to contradict Mrs. Cross. Therefore the case comes within the principle of *Cameron v. Hay* (6), and the cases collected by Sir George Innes, J., in *Gordon v. The Bank of New South Wales* (7). [*Everitt v. Bayliss* (8) and *Fisher v. Kemp* (9) were also referred to (a).]

Wise, for the plaintiff, shewed cause. It was a mere matter of opinion whether or not failure to reduce was caused by the filling up of the glenoid cavity. The Court were asked to say what no medical man called for the defendant had dared to suggest, that the hospital surgeons were so ignorant that they could not tell whether a man, under chloroform, had a false joint or not. Against the defendant's assertion that the plaintiff told him he had had an old dislocation, there was the plaintiff's evidence and that of his wife, sister, and comrades that he had not. If the negligence was Rosenthal's, the defendant was responsible for it: *Hancke v. Hooper* (10). [He exhaustively reviewed the evidence.] As to the second ground, the evidence was admissible to show Rosenthal's incompetence, and therefore the defendant's negligence ; secondly, on the ground that so far as that evidence was concerned, Rosenthal must be taken as identical with the defendant. But, if it was inadmissible, then it was immaterial, and therefore cannot be made a ground for granting a new trial: *Webster v. Friedeburg* (11), *Gordon v. The Bank of New South Wales* (7). The Court would not differ from the opinion

(5) 5 C. & P. 73.

(7) 7 N.S.W. L.R. 122.

(6) 1 S.C.R. App. 7.

(8) 3 N.S.W. L.R. 174

(9) Fost. Dist. Ct. Prac., App. 225.

(a) See also *Cooper v. Rutherford*, ante p. 192.

(10) 7 C. & P. 81.

(11) 17 Q.B.D. 737.

1887. of the presiding Judge except on clear and satisfactory grounds:
 CROSS *Humphrey v. Nowlands* (12). [He also cited *Bridges v. North*
 v. *London Railway Co.* (13)].
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Salomons, Q.C., in reply.

Our. adv. vult.

July 25. On July 25th the judgment of the Court (the CHIEF JUSTICE, *Faucett*, J., and Sir George *Innes*, J.) was delivered by

The CHIEF JUSTICE. This case was tried before his Honour Mr. Justice *Windeyer* and a jury of 12, on the 25th, 26th, 29th, and 30th days of March, 1886, on which last-mentioned day a verdict was found by a majority of the jury in the plaintiff's favour, with 500*l.* damages. A rule *nisi* having been obtained on the ground that the verdict was against the evidence, and also on the ground of the improper reception of evidence, the argument of such rule came on before us, and was argued on the 28th of February, and upon the 2nd and 3rd of March last, when the Court reserved its judgment. We have given this case our most careful consideration, and we have come to the conclusion that, consistently with the rules that govern the Court in the granting of new trials, on the ground that the verdict is against evidence, the verdict, although not satisfactory to any of the members of the Court, is one which cannot be disturbed. The plaintiff, a brickmaker, brought this action against the defendant, a medical man, for alleged negligence, or want of due skill, in not making a proper examination of an injury received by the plaintiff to the shoulder joint, for not discovering that this injury was a recent dislocation, and for not reducing such dislocation. It appeared that on the 15th of May, 1885, the plaintiff had a fall from his horse, and received some injury to his arm; the defendant being thereupon called in to attend him, saw him on the morning after the accident, but, according to the plaintiff, made no examination, at once assuming that the dislocation, which, whether new or old, then undoubtedly existed, was old, and treated him for a sprain or a bruise of the shoulder. It is conceded by the defendant that he did not then attempt to reduce any dislocation, and that he did treat the plaintiff for a

sprain or a bruise ; but he states that the plaintiff told him, and he alleges the fact to be, that the dislocation was one of old standing, received when the plaintiff was a boy, and, that being so, it was not right to put the plaintiff to pain by making further examination, it not being possible to reduce a dislocation of such old standing. The case ultimately resolved itself into this, and the question for the jury really was : Was the dislocation of the plaintiff's shoulder one of long standing, or was it caused by the fall from the horse, which occurred immediately before the defendant saw the plaintiff ? Incidental to this, the main question, the question was raised, assuming the dislocation to be recent, did the plaintiff mislead the defendant by telling him that the dislocation happened many years ago ? Upon this latter question the defendant was in direct conflict with the plaintiff and the plaintiff's wife. The plaintiff gave the following history of himself, so far as injury to the arm was concerned :— He stated that in early life he was a butcher boy, having, as part of his duty, to carry a meat tray on his shoulder ; that at that time he received an injury to his shoulder, which incapacitated him from work for a short period ; that this injury was something in the nature of a sprain, but it was not a dislocation of the shoulder ; that he soon recovered the perfect use of his arm, and was able to pursue his usual avocation, which necessitated the raising of the arm above the shoulder. Afterwards he joined the Cambridgeshire Militia, and before doing so had to submit to a medical examination, which was proved by Dr. Simpson, of H.M.S. Nelson, to be of such a nature that an unreduced dislocation of the shoulder joint would be discovered, as the plaintiff could not have gone through the necessary movement if so injured. The plaintiff stated that he passed this examination, and afterwards went through ordinary drill, including the extension movements, one of which was the raising of his arm above his head ; that for the last 29 years he carried on the business of a brickmaker, and in the conduct of his business had, in order to stack bricks, to throw them up a considerable height, again necessitating the raising his arm above his head, and this he says he did without difficulty. The plaintiff alleges he received the injury, which is now apparent (a dislocated

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shoulder), when he fell from his horse on the 15th of May, 1885; that he sent for the defendant to attend him; that when the defendant first saw him he asked him if his arm was ever hurt before; that he replied he had sprained it when a boy, whereupon the defendant said, "Oh, it was put out then," but that he (the plaintiff) at once denied this. He says the defendant made no examination of the shoulder, but appeared to be satisfied that the immediate injury was a bruise or sprain, and for that the defendant then treated him. Having undergone this treatment for a period of about 11 weeks, and not getting relief, he consulted another doctor (Dr. Beattie), who appears to have come to the conclusion that the dislocation was recent, and caused by the fall; but as 11 weeks had elapsed since the accident, he did not like to treat the plaintiff by himself, but sent him with a letter and a statement of the injury to the Sydney Hospital. In this statement Dr. Beattie said he was of opinion that there existed a sub-coracoid dislocation, which might be reduced. At the hospital the plaintiff was seen by Drs. Tarrant, Woodward, Lowe, Muskett, and Munroe, all of whom appear to have come to the conclusion that the dislocation was recent, as they, or some of them, on two several occasions placed the plaintiff under chloroform, and first by manipulation, and afterwards by the use of pulleys (a very powerful implement), endeavoured to reduce the dislocation, but without success. It is quite evident these doctors must have considered the dislocation to have been recent, and not more than three months old, for although such dislocations have, according to medical authorities (several of which were referred to at the trial and again before us), been reduced even when twelve months had elapsed, yet this is the exception, and three months may be taken according to the best authorities as the usual limit, after which time an operation of this description is not usually attended with success. However, they were in fact unsuccessful, and the plaintiff is now admittedly suffering from an unreduced dislocation of the shoulder joint. The defendant's case is that the dislocation is of old standing, and probably occurred when the plaintiff says he received the sprain as a boy. He says that when he went to see the plaintiff, the moment he removed the

covering from off the arm he saw the shoulder was out, and at once said to the plaintiff, "Your shoulder is out;" that the plaintiff said, "Oh, that is an old affair that happened when I was 15 years of age, and a hard day's work has always come against me since;" that a horse doctor had attended him. The defendant says he then carefully examined the rest of the arm, and feeling satisfied that the injury recently received was nothing more than a severe bruise, so treated him. The defendant says that he observed more motion than the plaintiff could have had if the dislocation had occurred so recently as the day before. He says he saw the plaintiff on the 22nd and 29th of May, and again on the 2nd of July, on which last-mentioned day he found he had fair use of the joint—greater than was possible if the dislocation took place on the 15th May, and that, therefore, a false joint must have formed after the old dislocation. The defendant further said that "he had not the least doubt it was an old dislocation," and thought any further examination than that which he had made when he first saw the plaintiff would have been the "refinement of cruelty." The day before the defendant first saw the plaintiff, the plaintiff had been seen and attended by Mr. Rosenthal, a chemist in the employment of the defendant, and this gentleman states that when he first saw the plaintiff he noticed a difference between the plaintiff's arms, and drawing attention to it, the plaintiff told him that when he was a boy he had put it out, when it was set by a horse doctor. He says the plaintiff's sons, who were present, also stated the injury then apparent was one of long standing, and as to what occurred on this occasion Rosenthal is corroborated by other witnesses. Ten medical men of standing were called by the defendant, who each stated to the effect that, assuming the defendant's version of what took place on the defendant's first visit to the plaintiff to be correct, they were of opinion the defendant had acted properly in not making any further examination of the plaintiff's arm than was then made. It will be observed that the plaintiff and the defendant are in direct conflict as to what took place at the first visit, and the plaintiff's wife supports her husband's version. The medical evidence is left in a very unsatisfactory position, arising probably from the obscure nature of the case.

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Three doctors who examined the plaintiff under chloroform were of opinion that the dislocation was of recent origin, and indeed nothing else would justify the two operations these gentlemen, with two others, undertook. They appear still to hold that opinion, notwithstanding the unusual want of success attending these operations, and the fact that that want of success itself points distinctly to the dislocation being one of longer standing than three months, or even a year ; moreover, the entry made in the hospital book by Dr. Lowe (which Dr. Tarrant says is an error) rather tends to show that the writer was then of opinion that the dislocation was old, although his evidence at the trial was strongly opposed to this theory. None of the medical men called for the defence could give a positive opinion one way or the other, although they were generally of opinion that the want of success attending the hospital operation was indicative of an old injury. Such is the state of the evidence, conflicting and unsatisfactory. It was urged on the part of the plaintiff that the power of raising the arm above the head evidenced by the defendant's being able to carry a butcher's tray, by his going through military drill, and by his pursuing the business of a brickmaker, together with the opinion of Dr. Beattie, borne out by Dr. Tarrant and the other hospital doctors, and their attempting to reduce the dislocation, all pointed to the dislocation being one of recent occurrence, while on the part of the defendant it was strongly urged that this dislocation, if recent, could not have escaped the attention of the defendant, who was admittedly a gentleman possessed of great skill and much experience in his profession ; that at any rate some of the doctors were of opinion that the over-head motion could be regained, even though the dislocation had not been reduced ; and lastly, the want of success attending the hospital operation was a crucial test, demonstrating that the injury was old, and of long standing. Under these circumstances, what can the Court do ? We gather that his Honour Mr. Justice *Windeyer* thought the verdict right, and one which the evidence entirely justified.

Now, although the opinion of a Judge who tries a case is by no means conclusive, yet in determining whether a verdict is against evidence his opinion must be taken into serious considera-

tion (*Webster v. Friedeberg*, 17 Q.B.D. 736), and his opinion should form one of the elements upon which the Court is to base its determination. It is not sufficient for us to say that on the evidence appearing upon the Judge's notes we would have come to a different conclusion; nor is it sufficient that we may think the verdict eminently unsatisfactory. We must, in order to set aside a verdict as being against evidence, come to the conclusion that the verdict is not only unsatisfactory, but unreasonable and unjust, and such as reasonable men ought not to have found. If the verdict be one such as reasonable men might find, it cannot be disturbed; and for this position the cases of *Solomon v. Bitton* (8 Q.B.D. 176), *Webster v. Friedeberg* (17 Q.B.D. 736), and the *Metropolitan Railway Company v. Wright* (11 App. Cas. 152), are authorities, if, indeed, it be necessary to cite authorities for a position now well established. We are unable to say that the verdict returned in this case was one which reasonable men might not so find. The questions which arose were entirely of fact, and, therefore, under our constitution, eminently for a jury to determine; though we venture to think it would require a jury of great, perhaps unusual intelligence, and endowed with skill in sifting evidence, to come to a truly satisfactory conclusion upon the conflicting and difficult evidence adduced. If the result be unsatisfactory to us (as we confess it is), what guarantee have we, should the case be submitted to another jury, that the result will be in any degree more satisfactory?

In conclusion, we refer to and adopt the language of Sir James Wilde in delivering judgment in the case of *Scott v. Scott* (33 L.J. Mat. Cas. 1), and deem his observations of general applicability. He says at page 3:—"New trials are, in themselves, an enormous evil, though there are cases in which justice demands them. No element in the administration of justice is so destructive of its efficiency as uncertainty, and no grievance is more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shatters so much that confidence in the law which it is the first duty of all tribunals to uphold. The Court does not exercise the function of a mere appeal from the jury. It is not its duty

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to go over the same ground with them, and reverse their decision, merely because it arrives at an opposite conclusion."

The rule was also granted on the ground of the erroneous reception of evidence. It appears that the plaintiff's wife had a conversation with Rosenthal in the absence of defendant, at which conversation she alleged she said to Rosenthal, "What a strange thing it is you did not know my husband's shoulder was out," and that he thereupon said, "No more it was." She replied, "It was out, and it is out now." We do not think that this conversation, taking place as it did in the absence of the defendant, was properly received in evidence, but we fail to see that it was in any way calculated to influence the verdict. It appears to us that what the plaintiff's wife must have been understood to allude to was the recent accident, and that Rosenthal must have so thought when he replied "No more it was," inasmuch as it is a fact common to both sides that at some time or the other the shoulder was dislocated, and the dislocation not reduced. The denial, therefore, of Rosenthal, if applicable to the recent accident, is only in accordance with the evidence he gave at the trial. If, however, it was intended by this evidence to show that the defendant did not believe the plaintiff's shoulder to have been at any time dislocated, then this is opposed to the plaintiff's own evidence, as also that of his wife, who states that the moment the defendant saw the plaintiff he spoke of the shoulder having been dislocated, ascribing it, however, to the earlier accident. We are of opinion that this evidence, though erroneously received, was not material, and that, even if material, there was, independently of it, evidence to support the verdict; and on this point we think the case of *Gordon v. The Bank of New South Wales* (7 N.S.W. L.R. 122) lays down the principle by which the Court should be guided. We agree with the late Chief Justice, Sir James Martin, when he says, page 128, "It would be a reproach to our Courts if a new trial should be granted because evidence such as this was improperly received." The rule is discharged with costs.

Rule discharged with costs.

Attorney for plaintiff: *O. Bull.*

Attorneys for defendant: *Fisher, Ralfe & Salwey.*

GOLDSBROUGH & CO. v. M'MAHON (No. 2).

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New trial—Verdict against evidence—Verdict “demonstrably and manifestly wrong and unjust.”

March 10.
July 25.

The C.J.
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and
Innes J.

P. and T. Besnard, in November, 1882, in order to secure a large advance of money from the plaintiffs, executed a mortgage to them of a certain station, together with (among other things) 30,000 sheep and 7000 lambs. Default being made, the plaintiffs, on the 17th February, 1884, took possession of the station, and found of the 7000 lambs lambled in 1882 only about 100. The plaintiffs then brought the present action for conversion of 2290 sheep sold to the defendant in 1883, by P. and T. B., claiming them as being included within the 7000 lambs mentioned in the mortgage. At the trial both P. and T. B. swore that the number mentioned in the mortgage was a mistake, and that only 1700 lambs were ear-marked in 1882. Graham, a witness for the plaintiffs, swore that he, being in the Besnards' employment in 1882, ear-marked 2500. There was also evidence that in June, 1883, 2990 weaners (*i.e.*, lambs of 1882) were sold to the defendant by T. B., who swore that the 2990 weaners were never on the mortgaged station; but it was not shewn what became of the 1700 admitted to have been there. On the other hand, it was proved by Graham, and another servant of the Besnards, that in June, 1883, over 3000 sheep, including the 2500 weaners ear-marked by Graham in 1882, were sent to another station belonging to P. and T. B. Against this T. B. swore that he bought at Yass the weaners he sold to the defendant; but the defendant could give no evidence how they were marked; and one Bowler, to whom they were sold by the defendant, two days after his purchase from T. B., was not called as a witness, although P. B. had sworn in the Insolvent Court that 2000 of their sheep had been delivered to Bowler. The jury found for the defendant.

Held, that the verdict being so demonstrably and manifestly wrong and unjust, as to convince the Court that justice had not been done, and establish the fact that the jury had not really performed their duty, must be set aside. New trial granted.

The facts sufficiently appear from the head-note and judgment.

The case has been already reported for the decision of the Court, on an application by plaintiffs, the moving parties, for a postponement of the new trial motion, pending the prosecution of certain witnesses for the defence for perjury. This application was refused (1).

E. Barton and *O'Connor*, for the plaintiffs, in support of the motion for new trial.

W. J. Foster, Q.C., A.-G., for the defendants, shewed cause.

(1) 8 N.S.W. L.R. 118.

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The arguments on the new trial motion were heard on March 10th, before the CHIEF JUSTICE, FAUCETT, J., and SIR GEORGE INNES, J., when judgment was reserved.

July 25.

On July 25th, the judgment of the Court was delivered by

The CHIEF JUSTICE. This action, which was one for the conversion of certain sheep, was tried before his Honour Mr. Justice *Faucett* and a jury of four, on the 10th, 13th, and 14th days of September, 1886, when a verdict was found for the defendant. The plaintiffs have applied for a new trial, on the ground that this verdict was against the evidence, and the weight of evidence; and the rule absolute was argued before the Court on the 10th and 11th of last March, when the Court reserved judgment. The facts appear to be as follows:—Two brothers, Peter and Thomas Besnard, were the owners of a certain station called You Yangs, on Taringa Downs, and of certain sheep depasturing thereon, or upon certain other stations worked with Taringa Downs, one of which was a station called Kangiaroo. They, in order to secure a large advance made to them by the plaintiffs, executed, on the 24th of November, 1882, a mortgage in favour of the plaintiffs of Taringa Downs, and all blocks of country worked or connected therewith, together with 30,000 sheep, 7000 lambs, and certain cattle and horses. Default being made, the plaintiffs, on the 7th February, 1884, took possession of the station, sheep, &c., under the mortgage, and then found that of the sheep lambred in 1882, which, it will be noticed, the mortgage represented as being 7000, there were less than 100 upon the run. At the trial both Thomas and Peter Besnard swore that the number of lambs mentioned in the mortgage was a mistake, and that in point of fact but 1700 lambs were ear-marked in 1882. A witness called for the plaintiffs, named Graham, said that he was in the employment of the Besnards in 1882, and in charge of the ear-marking, and that he believed he ear-marked 2500 that year; so that it may be taken for granted that in place of 7000 lambs being on the station at the time of the mortgage there were no more than, according to the Besnards, 1700, or according to Graham, 2500; and, of these, according to the evidence on behalf of the plaintiffs, less than 100 were

delivered in February, 1884. The question for solution is what became of these 1700 or 2500 lambs? It appears that on the 11th of June, 1883, Thomas Besnard, through Mr. Hodson, a stock and station agent at Forbes, sold to the defendant 2990 weaners, which then would be the description of the lambs of 1882, and it is contended on the part of the plaintiffs that these 2990 weaners included the lambs of 1882 from Kangiaroo, in which case they are clearly entitled to a verdict as against the defendant for the value of such of the 2990 weaners as came from Kangiaroo. On the other hand, Thomas Besnard swore that none of the weaners sold to the defendant were ever on Kangiaroo, nor did they bear his ear-mark or tar-brand; that he and his brother were dealing largely in buying and selling sheep, and that in fact these weaners were purchased shortly before the sale to the defendant in the vicinity of Yass from Dr. Perry and other persons named. If this story be true, the plaintiffs can, of course, have no claim to them. To prove the plaintiffs' case, they called a witness named Brennan, who stated that he had been employed on the Kangiaroo station by the Besnards; that he knew the ear-mark and the tar-brand then used, and that in 1883 he was employed to draft out a large lot of weaners (the lambs of 1882); that he was sent away from the station by the Besnards with these weaners, and was in charge of them for two or three days, when he met one O'Keefe, another servant of the Besnards, to whom he delivered charge, and then travelled with them for a fortnight, when he left them, but saw them again afterwards at the East Billabong, at the camp of one Graham, another servant of the Besnards. Graham was called by the plaintiffs. He stated that he had ear-marked these weaners in 1882, and that, being camped with other sheep of the Besnards at the East Billabong in June, 1883, O'Keefe brought to him 3024 weaners, amongst which were the weaners he had ear-marked for the Kangiaroo Station in 1882. He stated that over 2000 of the 3024 were weaners he had so ear-marked. He further stated he drafted these weaners at East Billabong and sent them to a station of the Besnards called Blowclear, where he again saw them, counted them out of the yard, and delivered them to the defendant. Against these

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1887. positive statements of Brennan and Graham, who, so far as we
GOLDBERG & Co. can see, were disinterested and unimpeached witnesses, there is
o. only the evidence of Thomas Besnard that the weaners he sold to
M'MAHON. the defendant he bought at Yass. It appears that the defendant
The C.J. having, on the 11th of June, bought the weaners from Besnard,
sold them on the 13th of the same month to one Bowler, and one
would think if the statement made by Thomas Besnard was
correct that the weaners sold to the defendant did not bear his
ear-mark or tar-brand, as Brennan and Graham had sworn they
did, some evidence as to this fact ought to, and could easily, have
been forthcoming. The defendant was himself examined, but
gave no evidence as to the ear-marks or brands of the sheep he
bought. Nor was Bowler or any other witness called to prove
a matter which would have made the case quite clear in the
defendant's favour. The case thus stands :—On the part of the
plaintiffs a clear history and a clear tracing of the sheep from the
station to the defendant's possession. On the part of the
defendant, a mere unsupported assertion of Thomas Besnard
that the sheep sold to the defendant did not bear his ear-mark
or brand, but had been bought at Yass. This, however, is not
all. It appears that the Besnards sequestered their estate in
March, 1884, and that Peter Besnard was examined in the
Insolvent Court as to what had become of the sheep under the
mortgage. He then swore that, amongst other persons to whom
sheep had been delivered, Bowler (who, it will be remembered,
had bought from the defendant) had got 2000. No doubt Peter
Besnard said at the trial that, when giving his evidence in the
Insolvent Court he was unwell, and suffering pain, but he was
there to account for the sheep and lambs mentioned in the
mortgage, and he thus accounted for 2000 of them. This could
scarcely be a mistake, and if not, it is a complete corroboration
of the evidence of Brennan and Graham. Nor can it be lost
sight of that when possession of the station is taken in February,
1884, there are then on the station less than 100 of the 1700 or
2500 lambs which were ear-marked in 1882. It is said that the
seasons were bad, and the loss of sheep great; this may be so,
but it will not account for so great a deficiency. This evidence
also supports the evidence of Brennan and Graham that the

sheep ear-marked in 1882 had been removed. Now, we are much opposed to the granting of new trials on the ground that the verdict is against the evidence, and we fully recognise that juries, being the constitutional judges of facts, their judgment on such facts is not to be lightly dealt with, nor is their decision to be disturbed unless such decision is so manifestly and demonstrably wrong and unjust as to establish the fact that they have not really performed the judicial duty cast upon them. Under such circumstances, and when the Court is fully convinced that justice has not been done, to permit their verdict to stand would be to abrogate that jurisdiction which the law requires Judges will at all times exercise over trials before juries, as Lord Mansfield says, "Trials by jury in civil causes could not subsist now without a power somewhere to grant new trials :". *Bright v. Eynon* (1 Burr. 393). Being of opinion, as we are, that the verdict in this case is demonstrably and manifestly wrong and unjust, is opposed to the weight of evidence, and contrary to the evidence, and is such a verdict as no jury viewing the whole of the evidence could reasonably find (*Metropolitan Railway Company v. Wright*, 11 App. Ca. 152), we are compelled to arrive at the decision that this verdict must be set aside, and that there be a new trial. The costs of the last trial to abide the event of the second trial. The costs of this motion to be paid by the defendant.

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*Rule absolute.*Attorneys for plaintiffs : *Want, Johnson & Co.*Attorney for defendant : *W. T. Coonan.*

FURNER v. M'CABE.

Bill of exchange—Notice of dishonour—Indorsee against indorser—Subsequent action by indorsee (holder) upon original consideration—Laches—Payment—Estoppel.

May 17.

Aug. 2.

The plaintiffs sold goods to the defendant to the amount of 13*l.* 16*s.* 11*d.*, and to the defendant's son to the amount of 68*l.* The defendant's son thereupon made a promissory note in favour of the defendant for 81*l.* 16*s.* 11*d.*, which the defendant indorsed to the plaintiffs. The note was dishonoured at maturity, and the plaintiffs, who were then the holders, sued the defendant on the note in a District Court, and recovered a verdict, which was set aside on appeal on the

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ground that the defendant had not received due notice of dishonour. The plaintiffs thereupon sued to recover 13*l.* 16*s.* 11*d.*, the price of the goods sold to the defendant.

Held (reversing the decision of the District Court Judge), that the *laches* of the plaintiffs in not giving the defendant due notice of dishonour, operated so as to make the note equivalent to payment as between the plaintiffs and the defendant; and that therefore the plaintiffs were not entitled to fall back and sue upon the original consideration.

DISTRICT COURT APPEAL from a decision of Mr. District Court Judge *McFarland*, who signed the following notes:—

Plaintiffs in this case, which was tried on the 18th March, 1887, sued to recover 13*l.* 16*s.* 11*d.* for goods sold and delivered to defendant between 28th October, 1885, and 19th March, 1886, which sale and delivery defendant admitted. It was proved that on the 28th April, 1886, plaintiffs had obtained a promissory note from defendant's son indorsed by the defendant for 81*l.* 16*s.* 11*d.*, which amount included the sum now sued for.

This note was dishonoured, and plaintiffs sued the defendant upon it, and recovered a verdict, but that verdict was subsequently set aside on appeal, and a verdict entered for the defendant upon the ground that he had not sufficient notice of the dishonour of the note.

I held in the present action that plaintiffs could revert to the former consideration and cause of action, and recover the 13*l.* 16*s.* 11*d.*, notwithstanding the giving and taking of the note, and the subsequent proceedings upon it, and accordingly returned a verdict for the plaintiff for the full amount, with costs and witnesses' expenses.

A rule *nisi* was obtained upon the following grounds:—1. That the plaintiffs, having accepted a negotiable security for the amount of the debt now sued for with other moneys added, and there being no evidence that such negotiable security still remained in the plaintiffs' hands, they could not now sue upon the original consideration. 2. That the plaintiffs having already sued upon the promissory note of 81*l.* 16*s.* 11*d.*, mentioned in the Judge's notes, and a verdict having been given for the defendant in respect of such note, the plaintiffs could not fall back upon the original consideration, and were, moreover, estopped from it bringing the present action.

The case was argued on May 4 before the CHIEF JUSTICE and

SIR GEORGE INNES, J., who ordered it to be re-argued before three Judges.

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Accordingly, on May 17, the case was re-argued.

Sly for the appellant (defendant). The plaintiff having already sued on the note, and failed on the ground of insufficient notice of dishonour (1), is now estopped by the judgment of the Court. He cannot now sue again on the original consideration; for as it is laid down in *Byles on Bills* (12th Ed.), p. 383, "the delivery of a valid bill or note suspends the creditor's remedy for a debt, and if he either receive the money on the instrument or be guilty of *laches*, it operates as a complete satisfaction." And (at p. 387), "Where a debtor *indorses* a bill to his creditor, the creditor cannot sue for his debt without proving notice of dishonour." So in *Chitty on Contracts* (11th Ed.), p. 705, it is laid down that "the rule with regard to all negotiable instruments is, that if they are taken on account of a pre-existing debt, they operate as a discharge of that debt, unless the holder does all that the law requires to be done, in order to obtain payment of them (2). . . So if the debtor himself was entitled to a regular presentment for payment, or to due notice of dishonour, and the creditor or holder be guilty of *laches* in regard to such presentment or notice, so that the debtor is exonerated from liability *on the instrument*; he will become equally exonerated from his liability for the original debt."

[SIR G. INNES, J., referred to *Smith v. Mercer* (3).]

That is still a stronger case than this. *Bridges v. Berry* (4) is also an authority in support of the proposition cited from *Chitty*. In all these cases the defendant was primarily liable. Again, in *Peacock v. Pursell* (5), cited in *Byles* at p. 384, *Erle*, C.J., says: "The legal effect of taking a bill as a collateral security is, that if, when the bill arrives at maturity, the holder is guilty of *laches*, and omits duly to present it and to give notice

(1) 3 Weekly Notes (N.S.W.) 43.

(2) Per *Bayley*, J., in *Camidge v. Allenby* (6 B. & C. at p. 382).

(3) L.R. 3 Ex. 51.

(4) 3 Taunt. 128.

(5) 14 C.B. N.S. 728; 32 L.J.C.P. 266.

1887. of its dishonour, if not paid, the bill becomes money in his hands, as between him and the person from whom he received it. That being so, the plaintiff's debt is satisfied." The same principle is laid down in *Soward v. Palmer* (6). But I put the case on still higher ground. Where a man has two remedies he can sue on either. If he likes to sue on the note he cannot afterwards sue on the original consideration. When he has once made his election the cause of action *transit in rem judicatam*. No doubt in an action on the original consideration he could have put a count on the note, and a count for goods sold and delivered.

[FAUCETT, J. Is not that inconsistent with your last argument?]

No. If he sues in two counts he can only get one judgment. *Kendall v. Hamilton* (7)—see the judgment of Lord *Blackburn* at p. 542, where he cites *King v. Hoare* (8)—shows this. He says that the judgment is a bar "partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action." So in the case of joint tortfeasors, once you get a judgment against one, your remedy against the rest is gone.

[The CHIEF JUSTICE refers to *Tarleton v. Allhusen* (9)].

That case is distinguished in *Byles* at p. 237: "Judgment recovered on a bill or note is an extinguishment of the original debt, as between the plaintiff and the defendant. But it alone, without actual satisfaction, is no extinguishment as between the plaintiff and other parties not jointly liable with the original defendant, whether those parties be prior or subsequent to the defendant. Nor is it an extinguishment as between a party prior to the plaintiff, to whom the plaintiff, after the judgment, returns the bill, and the defendant." In *Kendall v. Hamilton* (7) judgment without satisfaction was held to be a bar. So *Brinsmead v. Harrison* (10) decides that a judgment in an action

(6) 8 Taunt. 277.

(9) 2 A. & E. 32.

(7) 4 App. Cas. 504.

(10) L.R. 7 C.P. 547.

(8) 13 M. & W. 496.

against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied.

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[FAUCETT, J. That is, if you have a judgment you must enforce it.]

[SIR G. INNES, J. In *Kendall v. Hamilton* (7) it was sought to make out that the debts were several as well as joint; but it was held that they were joint only. In tort, however, joint wrong-doers are severally, as well as jointly, liable].

The reason is well put by *Blackburn, J.*, in *Brinsmead v. Harrison* (10), at p. 553: "On the ground that *transit in rem judicatam*, or upon the general principle of convenience which is expressed in the maxim, '*Interest reipublicæ ut sit finis litium.*'"

[FAUCETT, J. The decisions in cases of tort seem to me to proceed on this principle, that where the plaintiff has recovered in tort, he has recovered in respect of his whole claim.]

[SIR G. INNES, J. But the same would apply in cases of contract, where the liability is joint and several.]

[FAUCETT, J. If you get a judgment and cannot realise upon that judgment, it seems very hard that you should not be able to sue others who may be jointly liable.]

But the cases show that it is on the ground of public policy.

Pring, for the plaintiffs, showed cause. In all the cases cited the plaintiff had recovered a judgment; here the plaintiffs were defeated in their action on the promissory note; therefore, they are entitled to fall back upon the original consideration. The former action was on the promissory note, to which the defendant pleaded that he had received no notice of dishonour; and judgment was given for the defendant. That is to say, the Court held that to be a sufficient answer to the action on the promissory note. That was the only point decided.

[FAUCETT, J. But that is the whole point.]

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The proper test should be, what is the issue to be tried between the parties. I admit that we cannot say that judgment was not given for the defendant in the action on the note.

[SIR G. INNES, J. Nor can you say that notice of dishonour was not necessary.]

The case for the defendant is this:—You could not recover on the promissory note, because notice of dishonour was not given, and you cannot sue on the original consideration, because you are estopped by the judgment recovered by the defendant in the action on the note. My argument is that all that was decided in the former action was that the plaintiff failed to establish his right to have judgment entered for him. If we had recovered judgment on the promissory note it would have been otherwise, because then we should have been bound to have followed our judgment, and could not have fallen back on the original consideration. It is laid down in *Benjamin on Sales* (3rd Ed.), p. 720, that, "If a bill or note be indorsed, and given by the buyer to the vendor merely as a collateral security, the duty of the vendor is the same as if the bill had been given in conditional payment; and if he neglect to present, or to give notice of dishonour to the buyer, the buyer will be discharged from liability on the bill, and the *laches* will operate so as to constitute the bill absolute payment for its amount." That is *Benjamin's* note on the case of *Peacock v. Pursell* (5), and accepting that as a correct statement of the law, how is the defendant prejudiced? He could sue the maker of the note, and so lose none of his rights. In *Peacock v. Pursell* (5), *Erle, C.J.*, is thus reported in 32 L.J.C.P. at p. 267: "When the time of payment came, the bill was not paid by the acceptor, but the plaintiffs, nevertheless, gave no notice of dishonour. The consequence is, that the bill is, by reason of the *laches* of the plaintiffs, not available against any of the parties whose names appear on it, except the acceptor, who is insolvent. I think the result of that is, that, as between the plaintiffs and the defendant, the bill must be treated as money in the hands of the plaintiffs, just as much as if paid by the acceptor."

[SIR G. INNES, J., read the corresponding passage from 14 C.B.N.S. at p. 780.]

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In that case the defendant's remedies were prejudiced by the want of notice of dishonour. Here the defendant is not in any way prejudiced. There is no question of insolvency here. I have treated the case as if the bill given by the son to the father was purely an accommodation note for the acceptance of the father. Therefore, the father, by not receiving notice of dishonour is not prejudiced, because he never could have recovered the 13*l.* as against his son. *Byles* (12th Ed.), at p. 130, says: "In an action by the drawer of a bill for 19*l.* 5*s.*, payable to his own order, against the acceptor, it appearing that the bill was accepted for value as to 10*l.*, and as an accommodation to the plaintiff as to the residue, Lord *Ellenborough* held, that although with respect to third persons, the amount of the bill might be 19*l.* 5*s.*, yet as between these parties it was an acceptance to the amount of 10*l.* only." The authority cited for this passage is *Darnell v. Williams* (11).

Sly, in reply. The rule as to posting notice of dishonour is not based on the question whether any damage has been received by the indorser. That question was not raised in the Court below at all.

Our. adv. vult.

On August 2 the judgment of the Court was delivered by

Aug. 2.

The CHIEF JUSTICE. This was a District Court appeal, which was argued on the 17th of last May. The action was to recover 13*l.* 16*s.* 11*d.*, for goods sold and delivered, and was tried before Mr. District Court Judge *McFarland* at Goulburn. The defence relied on set up the following facts:—It appeared that the plaintiffs had dealings with the defendant, and also with the defendant's son, resulting in the defendant's son becoming indebted to the plaintiffs in the sum of 68*l.*, and the defendant in the above sum of 13*l.* 16*s.* 11*d.* Thereupon the son made a promissory note in favour of the defendant for 81*l.* 16*s.* 11*d.*, which the defendant then indorsed to the plaintiffs. This note was dis-

1887. honoured at maturity, but the plaintiffs, who were then the holders, did not give to the defendant notice of such dishonour. FURNER v. M'CABE. The C.J. Notwithstanding this want of notice, the plaintiffs sued the defendant upon the note, and a verdict for the full amount was obtained in the District Court. This verdict was, however, set aside by this Court upon the defendant's appeal (a). The plaintiffs then sued the defendant for this 13*l.* 16*s.* 11*d.*, being that portion of the consideration for which the defendant was originally liable, and the District Court Judge found a verdict in the plaintiffs' favour. The defendant has now appealed, one of the grounds of such appeal being that the plaintiffs having already sued upon the promissory note for 8*l.* 16*s.* 11*d.*, and a verdict having been given for the defendant, the plaintiffs are not entitled to fall back upon the original consideration. I was for some time in doubt as to whether the defendant could in this action rely upon the neglect of giving notice of dishonour, inasmuch as he was liable to contribute to the payment of the note to the extent of the amount he was here sued for. I have, however, after careful consideration, come to the conclusion that the defendant being entitled to receive notice of dishonour (as already held by the Court), the plaintiffs are not entitled to fall back upon the original consideration. In *Foster v. Parker* (2 C.P.D. 18) a bill had been drawn, accepted, and indorsed by several persons for the purpose of raising money for the joint use of drawer, acceptor, and the several indorsers, and the indorsers, notwithstanding their liability to contribute as among themselves to the payment of the bill, were held entitled to receive notice of dishonour, and that to disentitle an indorser to such notice the holders must show that it was the indorser's duty as between himself and the other parties to the note to provide for it. In this case it clearly was not the defendant's duty, as between himself and the maker of the note, to provide for the payment of the sum of 68*l.*, the larger part thereof. This being so, it is well-established that the consequence of neglect of notice is that the party to whom it should have been given is discharged from all liability, whether on the note or on the consideration for which the note was paid (*Byles on Bills*, 292,

(a) 3 Weekly Notes (N.S.W.) 43.

11th edition). As was said by Mr. Justice *Williams* in *Peacock v. Pursell* (14 C. B. N. S., at page 730), "The laches of the plaintiff in not duly presenting the bill constitutes this a payment before action brought." So here it must now be considered that the effect of the plaintiffs' neglect to give the defendant due notice of dishonour of this note operated, and is treated by the law, as equivalent to payment as between the plaintiffs and the defendant of the amount sued for. The verdict obtained in this case must therefore be set aside, and a verdict entered for the defendant, with costs, and with the costs of this motion.

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Rule absolute with costs.

Attorney for appellant (defendant): *W. J. Fergusson*, for *Davidson* (Goulburn).

Attorney for respondents: *Pigott*, for *Betts* (Goulburn).

KINSELA v. METROPOLITAN MUTUAL PROVIDENT BUILDING AND INVESTMENT ASSOCIATION.

July 25.

Real property issue—Verdict given—Application to remove caveat—Costs.

After verdict in an issue under the *Real Property Act* in favour of the applicant, he should first ask the caveator to remove his caveat.

Semble, per *Fawcett, J.*, and *Innes, J.* If the caveat is not removed he should apply *ex parte* for an order removing it.

Quare (per the C.J.), if any order necessary.

The C.J.
Fawcett J.
and
Innes J.

A direction as to extra costs cannot be obtained before taxation.

Lingen, for the defendants (the applicants), moved on notice for an order directing the plaintiff to withdraw his caveat, and that the plaintiff pay the costs of and incidental to this motion, and all other costs that have been incurred by the defendants of and incidental to all proceedings under section 4 of 41 Vic. No. 18, and that the Registrar-General be directed to proceed with the defendants' application and to issue a certificate of title. The notice also asked that the Prothonotary be directed to tax certain extra costs of survey.

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[SIR G. INNES. You want a review of taxation before it has taken place !]

The affidavit in support stated that an issue under the *Real Property Act* had been tried, and found in favour of the defendants (applicants to bring certain lands under the Act), and that no notice of intention to proceed for a new trial had been filed by the plaintiff.

Walker, for the caveator, opposed. We are here in obedience to the notice, but no application was made to us to withdraw our caveat.

[The CHIEF JUSTICE. We can order that the caveat be removed, but the applicant must pay the costs of this motion, as no application was made to the other side.]

Lingen. We are compelled to come to the Court for the order to remove the caveat: 41 Vic. No. 18, s. 4. This is the only way of completing the record. A verdict standing for a 1000 years does not become an order of the Court, and would not do away with the existent order for trial. How could the examiner act on anything less than an order? We cannot sign judgment on the verdict given on the issue. It is not our business to run after the caveator, who has wronged us.

The CHIEF JUSTICE. I think the Court ought to set its face against attempts to heap up unnecessary costs. I think this motion was unnecessary. A verdict was given on the issues in the applicant's favour; and no motion has been made to set it aside. That being so, the applicants want to get an opinion of the Court as to the way in which the costs should be taxed. At this stage the Court cannot deal with it. The plaintiff should have been asked to withdraw his caveat. If the applicants want the order, I think it can only be granted on payment of costs.

FAUCETT, J. I am not prepared to say that in a general way the party successful on an issue should not obtain an order for the removal of the caveat.

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SIR G. INNES, J. I agree with his Honour Mr. Justice *Faucett*. There are many cases of this kind in which an order has been made, though it is not necessary to make such an order when the caveat is withdrawn. But it might have been done *ex parte*. I think, therefore, that the costs of the caveator, who has been wrongly brought here, especially to oppose the application as to the extra costs prematurely made, should be paid by the applicants.

*Order for the withdrawal of caveat
and issue of certificate, defendants
to pay costs of this motion.*

Attorney for applicants (defendants) : *H. Meyer*.

Attorney for plaintiff (caveator) : *T. Read*.

AITKEN AND CO. v. STEWART AND CO.

July 28.

Principal and agent—"Sole agent" for goods of foreign manufacture—Privity of contract—Usage of business—Convenience.

The C.J.
Innes J.
and
Stephen, J.

P., "sole agent" for the sale of the plaintiff's ale, shipped to him by the plaintiff in Scotland, sells a quantity in the ordinary course of business to the defendant, the invoice bearing the words "bought of P.," and in the corner "agents for James Aitken and Co." P., being indebted to the defendants in an amount exceeding the price of the ale, went insolvent, and the plaintiffs, not having been paid for the ale by P., sued the defendants for the price and obtained a verdict in a District Court.

Held, that there was no privity of contract between the plaintiffs and the defendants, and that the plaintiffs ought to have been nonsuited.

Held, also, that according to the usage of business, and the principle of convenience, the relation between the plaintiffs and P. was not that of principal and agent, but of consignor and consignee.

Verdict ordered to be entered for the defendants.

DISTRICT COURT APPEAL. Phillips and Co., wine and spirit merchants in Sydney, held themselves out as "sole agents" for Aitken's ale. The defendants, also merchants in Sydney, were in the habit of purchasing from Phillips and Co. quantities of that ale. In August, 1886, Phillips and Co. sold through a broker to the defendants four hogsheads of Aitken's ale at

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5l. 10s. per hogshead. In September, Phillips and Co. sequestered their estate, and at the time Phillips and Co. were indebted to the defendants in an amount exceeding the price of the ale in question, and the defendants proved for the difference in the Insolvency Court. Subsequently to the sequestration, Aitken and Co., brewers in Dumfries, Scotland, sent out an agent with a power of attorney to act for them, and not having been paid by Phillips and Co. sued Stewart and Co. for the price of the ale purchased by them from Phillips and Co.

The District Court Judge (*Dowling*) gave a verdict for the plaintiffs for 20l. 18s.

The defendants appealed.

Nash, for the appellants, referred to the evidence of *Ferguson*, a clerk of Phillips and Co. (set out in the Chief Justice's judgment), to show that the contract was between Stewart and Phillips, and there was no privity between Stewart and the plaintiffs. The words "sole agents" could not now be used in their ordinary sense, but must be taken to mean "sole consignees" of these particular goods. Therefore the doctrine of principal and agent did not apply. Besides, it would be extremely inconvenient to hold otherwise, as is pointed out in *Armstrong v. Stokes* (1). He also cited *Thompson v. Davenport* (2).

Pring, for the plaintiffs, shewed cause. Phillips and Co. held themselves out to the world as sole agents for the plaintiffs' ale. The defendants, therefore, had notice that Phillips was agent for the plaintiffs as disclosed principals.

The CHIEF JUSTICE. I am of opinion the plaintiffs ought to have been nonsuited. It appears from the evidence of a witness called by the plaintiffs that in September last Phillips sold four hogsheads of ale of plaintiffs' brand to the defendants, and in the invoice appears the words "bought of Robert Phillips and Co." True, on the corner are the words in print "Agents for James Aitken and Co.," but Mr. *Nash* has already shown that that is a common occurrence in the course of business. It is very possible that Aitken

(1) L.R. 7 Q.B. at p. 605

(2) 9 B. & C. 78 : SIM. L. cases.

and Co. do ship their ale to Phillips and Co. as sole consignees of Aitken's ale, and that Aitken and Co. immediately upon shipping draw upon Phillips and Co. through some bank, and that it is only upon Phillips and Co. accepting the drafts that they can obtain the bills of lading, and get the ale which is shipped to them. Phillips and Co., so far as purchasers from them are concerned, sell the ale as their own goods. Therefore, it is to Phillips and Co. that the purchaser must look in the event of there being any damage to the goods, or a delivery of goods which turned out to be inferior to sample. He could sue Phillips and Co., and Phillips and Co. only, in the case of any misdescription of the goods or damage. On the other hand, if the purchaser had not paid for the goods, who would sue him? Surely Phillips and Co., and not Aitken and Co. The contract, as shown by a bought and sold note, the invoice, and the delivery order, was a contract between Stewart and Phillips, and no one else, and on this ground I think the conclusion of the District Court Judge was incorrect, and that the verdict ought to have been for the defendants.

SIR G. INNES, J. I am of the same opinion. The contention of Mr. *Pring* amounts to this, that because a man announces himself to be the "sole agent" for any particular commodity that may be well-known in commerce, he cannot be the principal in any sale of that commodity, but can only sell as agent of the manufacturer. A statement of that kind only requires to be mentioned to carry its own refutation. There must have been some confusion in his Honour's mind between Aitken's ale and the property in Aitken's ale. There was, it seems to me, no privity whatever between the defendants here and Aitken and Co.; and the cases of *Ireland v. Livingstone* (3) and *Hutton v. Bullock* (4), though converse cases, clearly establish the principle.

STEPHEN, J. If Mr. *Pring* is right, it would follow that an action might be brought by Stewart against Aitken and Co. in Scotland. Phillips and Co., by merely calling themselves agents, cannot establish a privity of contract between their customer and the principal in Scotland. I am greatly influenced by the

(3) L.R. 5 H.L. at p. 408.

(4) L.R. 9 Q.B. 572

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passage cited by Mr. Nash from *Armstrong v. Stokes* (1) as to the great inconvenience which would result if this action could be maintained.

Stephen, J.

The COURT ordered the verdict to be entered for the defendants with costs.

Pring asked for a new trial.

The CHIEF JUSTICE. No doubt we have the power to grant a new trial, but it is not a case in which we ought to exercise it.

Rule absolute with costs.

Attorneys for plaintiffs: *Laurence & Rich.*

Attorney for defendants: *Sanders.*

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DAVIDSON v. DENNIS.

The O.J.
Innes J.
and
Stephen, J.

Insolvency—Order and disposition—Bill of sale over furniture allowed to insolvent (grantor) by creditors—Furniture at time of insolvency in hands of bailiff—Trover by bill of sale holder (an assenting creditor) against grantor—Insolvency Act (5 Vic. No. 17), ss. 34, 55.

On the 6th October, 1885, the defendant gave the plaintiff a bill of sale, which was never registered, over certain household furniture. On the 9th April, 1886, the defendant gave a second bill of sale, which was registered on the 28th April, over the same furniture, to one Tait. On the 11th May, 1886, the defendant became insolvent, the furniture at the time being in the possession of a bailiff under a writ of execution. On the 9th June, 1886, T. assigned his bill of sale by deed to the plaintiff. Neither T. nor the plaintiff proved for any part of the debt secured by the bill of sale. On the 19th August, 1886, the plaintiff joined with the other creditors in allowing the defendant his furniture, including the furniture comprised in the bill of sale; and the allowance was duly ratified by the Chief Commissioner. The plaintiff brought an action in the District Court against the defendant for conversion and detinue of the furniture, and was nonsuited on the ground that, having joined in the directions allowing the defendant his furniture, must be taken to have abandoned his claim upon it.

Held (on appeal), that, as at the time of the insolvency, the furniture was in the hands of a bailiff, and not in the "possession, order, or disposition" of the insolvent within the meaning of s. 55 of 5 Vic. No. 17, the action was maintainable.

DISTRICT COURT APPEAL. Action for conversion and detinue of certain furniture and household effects worth 175*l.* Defence:—

1. Not guilty. 2. *Non detinet*. 3. That the goods were not the plaintiff's. 4. That the plaintiff, as one of the creditors of the defendant, joined with the other creditors in allowing the defendant to retain for his own use his household furniture, and that the Chief Commissioner of Insolvent Estates ratified the allowance. 5. That between the time of giving a certain bill of sale, under which the plaintiff claims, and the commencement of this action, the defendant's estate was duly sequestrated as insolvent, and that it is still so insolvent, and that by means of such sequestration the property claimed by the plaintiff herein became vested in the official assignee for the benefit of all creditors.

The facts as they appeared from the Judge's notes were as follows :—On the 6th October, 1885, the plaintiff advanced 57*l.* 7*s.* to the defendant upon the security of a bill of sale bearing that date, over his household furniture, comprising the property now sued for. This bill of sale was not registered. On the 9th April, 1886, the defendant gave to one Tait a bill of sale over the same goods, to secure 130*l.* This bill of sale was registered on the 28th April, 1886. On the 11th May, 1886, the defendant became insolvent, the property being in the hands of a bailiff under a writ of execution. At this time the defendant owed the plaintiff 32*l.*, the balance of the advance secured by the first bill of sale. On the 9th June, 1886, the plaintiff purchased the interest of Tait, who assigned by deed to the plaintiff his bill of sale of 9th April. Neither Tait nor the plaintiff, as his assignee, ever proved in respect of the 130*l.*, nor any part thereof. On the 19th August, 1886, the plaintiff joined with the other creditors of the defendant, allowing him his furniture, including the chattels sued for. These directions were ratified by the Chief Commissioner of Insolvent Estates before action brought, so that the said furniture became thereby vested in the defendant. At the trial the plaintiff swore that when he joined in those directions he simply intended them to operate upon the defendant's equity of redemption in the furniture, so that if the defendant paid off the mortgage effected by the bill of sale of April 9th, 1886, he could then be in a position to retain the property free of any claim by the official assignee. The defendant gave in evidence the various proceedings in insol-

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veny, including the before-mentioned directions of creditors and the Chief Commissioner's ratification of same. It was not shewn in any way that the official assignee had elected to exercise the powers given him by s. 55 of the *Insolvency Act*, and the plaintiff proved that a demand had been made for the property and refused.

The District Court Judge ruled that the plaintiff, by joining in these directions to allow the defendant his furniture in a general, unqualified way, after he became entitled to what had been Mr. Tait's bill of sale, in addition to his own original bill of sale, must be taken to have abandoned his claims under both bills of sale, and could not now maintain his action, and he accordingly nonsuited the plaintiff, but without costs.

The plaintiff appealed.

A rule nisi was granted on the grounds:—1. That the Judge was wrong in nonsuiting the plaintiff. 2. That the Judge was wrong in holding that the plaintiff, by joining in the direction of the allowance of the defendant's furniture, was debarred from enforcing his rights and claims under the bill of sale of 9th day of April, 1886, given by the defendant to one Francis Tait, and subsequently, but prior to the date of the defendant's insolvency, assigned by the deed of the said Francis Tait to the plaintiff.

Gordon, for the appellant, referred to s. 34 of the *Insolvency Act* (5 Vic. No. 17), and was stopped.

Rogers, for the defendant, shewed cause. By s. 55 of 5 Vic. No. 17 the property in the goods was in the official assignee. The assignment by Tait to the plaintiff did not take place till after the sequestration; therefore the defendant is not entitled to recover: *Spackman v. Miller* (1). The plaintiff is estopped by his own consent, being the very person who moved that the defendant should be allowed his furniture.

[The CHIEF JUSTICE referred to *Ex parte Homan* (2) and *Ex parte Harding* (3).]

When the official assignee took possession of the goods under s. 55, the bill of sale was dead.

(1) 31 L.J. C.P. 309.

(2) L.R. 12 Eq. 598.

(3) L.R. 15 Eq. 223.

[The CHIEF JUSTICE. But the Judge has found that the goods were, at the time of the insolvency, in possession of a bailiff ; so that, according to *Fletcher v. Manning* (4), they did not pass to the official assignee.]

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The CHIEF JUSTICE. We think that the nonsuit in this case must be set aside. It appears that on the 6th October, 1885, the defendant gave the plaintiff a bill of sale over certain furniture, as security for money advanced to him by the plaintiff. On the 9th April, he gave a fresh bill of sale over the same furniture to one Tait. On the 11th May, 1886, he became insolvent ; and at that time the goods were in the possession of the sheriff's bailiff under a writ of execution. The plaintiff proved in the defendant's insolvency for 32*l.*, the balance owing to him on the first transaction. Subsequently, at an adjourned meeting, a motion was made and carried that the insolvent should be allowed his furniture, and was ratified by the Chief Commissioner, so that the effect of the order and ratification was that the insolvent got back whatever furniture he had apart from that included in the second bill of sale, and also the equity of redemption in the goods included in that bill of sale.

Afterwards Tait assigned his bill of sale to the plaintiff. Neither Tait nor the plaintiff proved in respect of the advances made by Tait ; therefore, as far as the Insolvency Court is concerned, no cognizance can be taken of those bills of sale. The official assignee does not appear to have exercised his powers under s. 39 of 5 Vic. No. 17.

Afterwards the plaintiff brings this action, and I can see nothing to prevent him maintaining it, the Insolvent Court having no cognizance of the bill of sale, or of the plaintiff as assignee or grantee of the original holder. It is said that the property in the goods passed, by the operation of s. 55 of 5 Vic. No. 17, to the official assignee. But we need not now consider the difficult points which might arise as to whether or not the goods vested in the official assignee, by virtue of s. 55, as it appears that at the time of the sequestration these goods were in the hands of a sheriff's bailiff under a writ of execution. The effect of the

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goods being taken in execution was that they were not in the order and disposition of the insolvent. That is in accordance with the dictum of *Parke, B.*, in *Fletcher v. Manning* (4), at p. 581. This was followed by an express decision in *Ex parte Foss* (5), where *Turner, L.J.*, says, at p. 243: "There is no pretence for saying that the possession afterwards was in any sense the possession of the bankrupt, or that the bankrupt continued in possession, after the execution by the sheriff, in the same mode as he had been in possession prior to the execution levied. This state of circumstances, I think, brings the case distinctly within the doctrine of *Fletcher v. Manning* (4), which is in conformity with a long train of previous decisions, to be found in *Jones v. Dwyer* (6), and *Arbouin v. Williams* (7), and in *Ex parte Smith* (8), and *Robinson v. McDonnell* (9)." On these grounds, therefore, that at the time of the insolvency the property was in the hands of a bailiff, and not in the possession, order, or disposition of the insolvent within the meaning of s. 55, there is nothing to interfere with the plaintiff's right to bring this action.

SIR G. INNES, J. I am of the same opinion. The bill of sale, which would have been valueless if the goods had not been seized by the sheriff, remains alive, and enables the plaintiff to claim these goods as his own.

STEPHEN, J. I am of the same opinion. Assuming the facts to be as Mr. *Rogers* has stated, then I quite agree that this allowance of his furniture to the insolvent could only operate as to goods then belonging to the insolvent, and not as to goods the property in which was in someone else.

*Rule absolute to set aside the nonsuit,
 with costs of this motion.*

Attorney for appellant: *W. J. Fergusson.*

Attorney for respondent: *S. J. Bull*, for *O'Brien & O'Brien* (Goulburn).

(5) 12 De G. & J. 230.

(6) 15 East 21.

(7) Ry. & Moo. 72.

(8) Buck. 149.

(9) 2 B. & Ald. 134.

BLAXLAND v. GRATTAN.

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Sheriff, sale by—Fi. fa.—Right, title, and interest—Registration.

B. obtained a judgment against W. G. and issued a *fi. fa.*, which was afterwards withdrawn. Subsequently to the issuing of that writ, W. G. transferred a selection to G. (the defendant). This transfer was not registered. Afterwards B. issued a second writ of *fi. fa.* against W. G., under which the sheriff sold to B. all W. G.'s right, title, and interest (if any) in this selection. This transfer was registered. B. brought ejectment against G. (the defendant).

Held, that the first writ, having been withdrawn, did not bind the land so as to invalidate the transfer by W. G. to the defendant; and that as W. G. had sold the land before the second writ was issued, there was no right, title, or interest left in him for the sheriff to convey, and therefore no transfer to register [*Re Elliott* (7 N.S.W. L.R. 271) followed]. If anything had passed at the sheriff's sale, the registration of that transfer would have given it priority over the unregistered transfer to the defendant.

NEW TRIAL MOTION. This was an action of ejectment brought to recover possession of a conditional purchase of 316 acres at Armidale. The plaintiff based his title on a purchase from the sheriff on the 9th June, 1886, of "the right, title, and interest (if any)" of one William Grattan in and to the said conditional purchase. On the 14th April, 1886, plaintiff recovered against William Grattan a verdict for 250*l.*, and subsequently judgment was signed for that amount. On the 26th April a writ of *fi. fa.* was issued and lodged, but withdrawn; and on the 13th May a second writ to levy the sum of 393*l.* 4*s.* 2*d.*, amount of judgment and costs, was issued and lodged. Under this writ, on the 9th June, the sheriff sold "the right, title, and interest (if any)" of W. Grattan to the plaintiff. On the 29th July this transfer was lodged with the land agent, and registered on the 14th November. The defendant claimed the land by virtue of a transfer from his father, William Grattan, dated 30th day of April, 1886, before the issue of the second writ of *fi. fa.* Notification of the transfer was made to the land agent in due course, but it was not registered. He afterwards transferred the land to Messrs. Nathan Cohen and Co., of Tamworth, by way of mortgage. At the trial of the action, before *Faucett, J.*, at Tamworth, written admissions of the above facts were made and put in evidence, and a verdict was entered *pro formâ* for the

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The C.J.
James J.
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Stephen, J.

1887. plaintiff, the Judge deciding that the first writ of *fi. fa.* having
BLAXLAND been withdrawn, did not bind the land so as to prevent the
v. transfer from William Grattan to the defendant, and that the
GRATTAN. second writ of *fi. fa.*, under which the sale took place, had
nothing to bind, as William Grattan had previously sold the
land to the defendant; and, therefore, the sheriff really sold
nothing to the plaintiff; but the transfer from the sheriff to the
plaintiff, dated the 29th July, 1886, having been registered in
the Registrar-General's office, and the previous transfer from
William Grattan to defendant not having been registered,
although bearing a date long antecedent, the Judge formally
decided that the property passed to the plaintiff. He, however,
reserved leave to appeal to the Full Court, and a rule *nisi* was
granted to set aside the verdict, and enter a verdict for the
defendant.

Salomons, Q.C. (*Gordon* with him), for the defendant, in support of the rule. A purchaser from the sheriff only gets the beneficial interest that was in the execution debtor. Mere registration will not enlarge that estate. The case of *Re Elliott* (1) is conclusive in the defendant's favour. (See the judgment of *Martin*, C.J., at p. 276.) And in *Fuller v. Goodwin* (2), *Stephen*, C.J., said: "Where there arises no question between two or more deeds executed by the same transferrer, or some person in his right, and conveying, or purporting to convey, the same property, registration is of no value." In that case the second registered conveyance, to which the Court gave effect, was by the official assignee of the transferrer of the first unregistered conveyance, and purported to convey the same property. Here all the sheriff sold was the right, title, and interest (if any) of the execution debtor. According to *Re Elliott* (1) nothing passed by that sale, and there was therefore nothing to register.

Pring, for the plaintiff, shewed cause. Admitting the principles upon which *Re Elliott* (1) was decided, the contention on the part of the defendant is open to the objection on the score of inconvenience which was upheld in *Fuller v. Goodwin* (2).

(1) 7 N.S.W. L.R. 271.

(2) 4 S.C.R. 66.

[The CHIEF JUSTICE. In *Re Elliott* (1) the judgment creditor had something, viz., the equity of redemption. How can we say here, when the judgment creditor had nothing, that the whole estate passes?]

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Substitute the sheriff for the official assignee, and *Fuller v. Goodwin* (2) is a direct authority in my favour. Purchasers from the sheriff, just as much as purchasers from an official assignee, should be protected against secret conveyances. The plaintiff is also entitled to succeed by virtue of his priority of registration. S. 11 of the *Registration of Deeds Act* (7 Vic. No. 16) enacts that all deeds and other "instruments," executed and made *bonâ fide* for valuable consideration, and which shall be duly registered, shall take priority, not according to their respective dates, but according to priority of registration. And s. 22 of the same Act defines the word "instrument" to include "not only conveyances and other deeds, but also all instruments in writing whatsoever whereby real or leasehold estates shall be affected or shall be intended so to be." This definition would clearly include a transfer from the sheriff, whatever its form.

The CHIEF JUSTICE. In this case it appears that on the 26th April, 1886, a writ of *fi. fa.* against W. Grattan, senior, was lodged with the sheriff, and not duly executed. On the 30th April, 1886, while that writ was so lodged, W. Grattan, senior, transferred the land in question to his son, the defendant. On the 29th July, a fresh writ of *fi. fa.* having in the meantime been issued against W. Grattan, senior, the sheriff sold all the right, title and interest (if any) in W. Grattan, senior, to the plaintiff. In the meantime the defendant had mortgaged the property to Nathan Cohen and Co. At the time of the sale by the sheriff Grattan, senior, had no right, title, or interest of any sort remaining in him. If he had had anything in him, the transfer from the sheriff to the plaintiff would by its registration have taken priority over Grattan's transfer to the defendant. The sheriff is merely a conduit-pipe, and can give no greater estate to a purchaser than was in the person whose estate he sells. If we were to hold otherwise, we should have to overrule *Re Elliott* (1), which, as it seems to me, was most properly decided. In

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that case the only beneficial interest which the execution creditor had at the time of the sale by the sheriff was the equity of redemption, and the Court held that nothing but that interest passed. It appears to me, therefore, that the verdict in this case should be entered for the defendant.

SIR G. INNES, J. I am of the same opinion, although *Re Elliott* (1) went further than this case requires us to go, inasmuch as we are not in this case called upon to construe s. 111 of the *Real Property Act*. Still that case involves all that is necessary for us to decide here. I see no reason why we should question the case of *Re Elliott* (1). The cases referred to were carefully considered by the Court, and it is only necessary to cite *Wickham v. The New Brunswick and Canada Railway Co.* (3), which is a clear authority for our present decision.

STEPHEN, J. I agree with their Honours; and I am inclined to go as far as Mr. *Salomons*, in saying that if A. conveyed an estate to B., and then conveyed all his right, title, and interest to C., C. would not, by registering first, take priority of B.; as C. would have no estate to register.

Rule absolute with costs.

Attorneys for plaintiff: *Fisher, Ralfe & Salwey.*

Attorney for defendant: *R. B. Asher, for Newman* (Tamworth).

July 26.
August 4.

KIDMAN v. PATTERSON.

Contract—Sale of sheep—Delivery—Cash payment—Vendor's lien.

The C.J.
Innes J.
and
Stephen J.

The plaintiff agreed to purchase certain cattle from the defendant for cash, and paid a deposit. On his arriving at the defendant's station, the cattle were counted, and the defendant allowed the plaintiff to start them on their journey, the plaintiff at the same time saying to the defendant, "I will now go up to the house (four miles off) and pay you." He did not, however, pay the balance of the purchase money in cash. The defendant, thereupon, retook possession of the cattle and scattered them over his run.

Held, that the vendor did not waive his right of lien, as the delivery was only conditional upon payment in cash: that condition not being performed, he had a right to retake the cattle.

Per Stephen, J. There was no delivery at all.

NEW TRIAL MOTION. The declaration contained two counts.

(3) L.R. 1 P.C. 64; 35 L.J. P.C. 6.

1. For non-delivery of certain cattle agreed to be sold and delivered by the defendant to the plaintiff. 2. Trover of 213 head of cattle.

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At the trial, before Sir G. Innes, J., and a jury of four, on the 13th and 14th June, it appeared that the plaintiff called at the defendant's station and agreed to purchase 213 head of cattle at 3*l.* 10*s.* per head for cash, and that he paid 50*l.* by way of deposit. The cattle were counted, and started in the custody of the purchaser's men, while he went with the defendant back to the homestead to complete the payment. He did not, however, pay the balance in cash, and the defendant retook possession of the cattle, and put them back on his run.

The learned Judge refused to nonsuit, and ultimately put the following question to the jury:—"Did the defendant give absolute possession of the cattle to the plaintiff, or was it only a conditional delivery dependent upon the plaintiff paying the price that day?" Answer:—"He gave absolute possession. As to the first count, we think the plaintiff was prepared within a reasonable time to pay cash; but not on delivery. Therefore, on the first count we find for the defendant."

On the second count they found a verdict for the plaintiff, with 426*l.* damages.

Pring, for the defendant, moved for a rule *nisi* for a new trial on the following grounds:—1. That the verdict was against evidence. 2. That the damages were excessive. 3. That his Honour should have ruled that the plaintiff had no right to possession of the cattle sufficient to entitle him to maintain an action of trover against the defendant. 4. That the evidence clearly showed that the delivery of the cattle was conditional only on payment of the price in cash, and the plaintiff having failed to pay in cash had no right to the possession of the said cattle.

A rule was granted on the first ground only.

Owen, Q.C., and *Pring* for the defendant in support of the rule. The sale being for cash the mere delivery did not pass the property in the goods to the buyer. The delivery was only

1887. conditional upon payment of the price in cash. That condition
 KIDMAN not being fulfilled, there never was any possession in the
 v. plaintiff to entitle him to maintain trover : *Bloxam v. Sanders* (1) ;
 PATTERSON, *Bishop v. Shillito* (2). The verdict was against evidence, as
 there was no evidence to shew that the defendant had any
 intention of abandoning his right to cash payment.

G. B. Simpson, Q.C., and Reid for the plaintiff shewed cause. The question is whether the verdict is one which reasonable men could not have found. The contract was really concluded and the property passed to the plaintiff when the defendant allowed the plaintiff's men to take the cattle. Having retaken the cattle so sold, the defendant is liable to the present action within the principle of *Gillard v. Brittan* (3).

Pring in reply.

Our. adv. vult.

The CHIEF JUSTICE. This was an application on behalf of the defendant for a new trial, on the ground that the verdict was against evidence. The action was one brought by the purchaser of certain cattle against the vendor, and in the first count of the declaration plaintiff alleged non-delivery, and in the second count trover. At the trial the jury on the first count returned a verdict for defendant as to non-delivery, and on the second count they found for the plaintiff, with damages 426*l.*, finding that there had been an absolute delivery, or rather, that the defendant had given absolute possession of the cattle to the plaintiff. The case was argued yesterday, and after careful consideration we have come to the conclusion that there ought to be a new trial. The only evidence I can see as to possession having been given by the defendant to the plaintiff is contained in the evidence of the plaintiff, who rests his case entirely upon the silence of defendant when he (plaintiff) spoke to his men, and told them to go on with the cattle.

The case is this : There had been a sale for cash of these cattle, which at the time were upon the defendant's run. They were mustered and brought into a certain paddock, and 213 were

(1) 4 B. & C. 941.

(2) 2 B. & Ald. 329 (n.).

(3) 8 M. & W. 575.

then counted out, which were to become, on payment of cash, the plaintiff's cattle. The sale was for cash, and it is clear law that under these circumstances the payment and delivery were to be contemporaneous acts. Of course it is also clear that the vendor may waive his lien—that is to say, although the sale may be for cash the vendor may give up possession of the goods sold to the purchaser without receiving cash, if he sees fit. The question here is, did the defendant do that? The evidence on that point simply rests upon one sentence, namely, that when the cattle were counted—they still being on the defendant's run—the plaintiff said to his men in the presence of defendant, "Go on with the cattle;" but in the same breath he said to the defendant, "I will now go up to the station-house (a distance of some three or four miles off), and pay you." Now, supposing it is true that the defendant said nothing and allowed the cattle to go away in the custody of the plaintiff's servants, still what did it mean? It simply meant that defendant was willing that plaintiff's servant should go on with the cattle provided that plaintiff fulfilled the condition of sale by paying cash. That would not amount to a waiver by the defendant of his lien as vendor. If goods are bought and paid for by a bill at three months, and this bill is dishonoured, the vendor's lien comes into force again. So here, even assuming for a moment that there was a waiver of the lien, the contract was weighted with a condition which was not fulfilled by payment in cash by the plaintiff, then, even assuming that the lien had been waived by what had taken place, still the right of lien immediately arose again the moment the cash was not paid. Each of these cases must be taken by itself. No doubt the general principle laid down in *Bloxam v. Sanders* (1) is distinctly approved of in a recent case in the House of Lords, *Grice v. Richardson* (4); but after all, in each case we must look at the evidence. In *Benjamin on Sales* (3rd Ed.) it is stated, at page 787:—"The goods are generally in the vendor's possession at the time of sale, and the modes by which delivery can be effected are so various as fully to justify Chancellor Kent's remark that 'it is difficult to select those leading principles which are sufficient to

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(4) 3 App. Cas. 319; 47 L.J.P.C. 48.

1887. carry us through the labyrinth of cases that overwhelm and oppress this branch of the law.' Many points, however, are free from doubt." Then again, at page 785, "The vendor's lien is abandoned when he makes delivery of the goods to the buyer. At what precise state of the dealings between the parties the acts of the vendor in the performance of his contract will amount to a delivery *sufficient to divest his lien*, is in some cases a matter very difficult to determine." Each case, therefore, must be determined according to the facts, and in this case the evidence of delivery rests upon the evidence of the plaintiff to which I have alluded. Under these circumstances I think the vendor did not waive the right of his lien in any way, and the payment in cash not having been made by the plaintiff, the vendor had a right to take his cattle and scatter them over his run, as he did. His Honour who tried the case also reported that if it had been his duty to decide the matter, he would have found a verdict the other way, and his summing up was in favour of defendant's not having abandoned his right of lien. I think there was no evidence upon which to found a verdict for the plaintiff, and therefore I am of opinion that we should set the verdict aside.

SIR G. INNES, J. Although the case is not free from difficulty, on the whole I concur in thinking that the verdict should be set aside. When I was asked to nonsuit, I confess I had some difficulty in arriving at a determination. In *Benjamin on Sales*, it is laid down at p. 658 (2nd Ed.)—p. 783 in the 3rd Ed.—"The vendor's lien may of course be waived expressly. It may also be waived by implication at the time of the formation of the contract, when the terms show that it was not contemplated that the vendor should retain possession till payment; and it may be abandoned during the performance of the contract by the vendors actually parting with the goods before payment." Again, at p. 666 (2nd Ed.)—p. 792 in 3rd Ed.—there is this passage to the same effect: "A delivery of goods sufficient to divest the lien is not effected by the mere marking them in the buyer's name, or setting them aside, or boxing them up by the purchaser's orders, and putting his name on them, so long as the vendor holds the goods, and has not agreed to give credit on them."

It seemed to me that there was evidence to justify me in leaving it to the jury to say whether the vendor had abandoned his lien or whether there had been only a conditional delivery.

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Bishop v. Shillito (2) shews that it is a question for the jury to say whether the delivery was conditional; there the Court held, on the facts as found by the jury, that the delivery was conditional only, and the condition being broken, trover would lie. Where there is only a conditional delivery there is no waiver. So long as there is a condition to be performed, the whole thing remains in suspense. But, on reconsideration, I think I ought to have nonsuited on the ground that there was no evidence given by the plaintiff, on whom the burden of proof lay, for the jury to find a verdict for the plaintiff. At the same time it is not clear; and as the question of damages had been entered upon, I still think I was right in refusing to nonsuit, so that in the event of the Court thinking there was any evidence, there would have been no necessity to send the case down again for a new trial. I concur in thinking that it was only a conditional delivery; but it is to be observed that none of the defendant's servants remained to watch their master's interests, but went about their ordinary business; and the cattle had been started on their journey in charge of the purchaser's servants. I think now there was not sufficient evidence to warrant the jury in coming to the conclusion at which they arrived; but at the same time I do not feel very strong; and I still think it is very difficult to determine what delivery is sufficient to divest the vendor of his right to possession.

STEPHEN, J. No doubt in this case the physical act of handing over these cattle to the plaintiff (the purchaser) was not a delivery sufficient to divest the vendor of his lien, irrespective of the question of payment. The buyer's men start off with the cattle; the seller says nothing; the buyer says come to the station and I will pay you. It is clear, therefore, that the vendor had no intention of abandoning his lien; his intention was to receive payment then and there. The buyer might have said to his men, "Drive away the cattle," at the same time putting his hand into his pocket to pay. I cannot think that

1887. that would divest the vendor's lien, and enable the purchaser to
 KIDMAN say, "I have got the cattle, you can wait for your money."
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 PATTERSON. Therefore, without considering the question of conditional
 Stephen J. delivery, I am of opinion that there was no delivery at all.

Rule absolute to set aside the verdict; costs of motion to be paid by plaintiff, and costs of previous trial to abide the event; amount of verdict paid into Court pending the appeal to be returned to defendant.

Attorneys for plaintiff: *Allen & Allen.*

Attorneys for defendant: *Ice-ton & Faithfull*, for *Jhonson* (Silverton).

August 4.

AUSTRALIAN LOAN & DISCOUNT Co. v. KIRCHNER.

Husband and wife—Principal and agent—Liability of husband on promissory note signed by him as agent for his wife—Husband and wife not joint contractors under the Absent Defendants Act (4 Vic. No. 6), sec. 19.

The C.J.
 Innes J.
 and
 Stephen J.

Declaration by plaintiffs against C. J. and W. G. K. on joint promissory note. Plea by W. G. K., setting out note signed C. J. K. per W. G. K. Replication that C. J. K. was the wife of W. G. K.

Held (on demurrer), that W. G. K. was not liable on the note [per the C.J., and Stephen, J.], as the note was made by him "as a mere scribe" for C. J. K., and that there was no contract by W. G. K.

Per tot. cur.: A husband and wife cannot be said to be joint contractors within the meaning of sec. 19 of the *Absent Defendants Act* (4 Vic. No. 6).

Quere, if the section applies to amendments on demurrer.

DEMURRER. Declaration:—The plaintiffs sue C. J. Kirchner and W. G. Kirchner for that the defendants on the 5th day of January, in the year of our Lord 1887, by their promissory note now overdue, promised to pay to B. Goldsmith or order 154*l.* 0*s.* 10*d.* four months after date, and the said

B. Goldsmith indorsed the said note to John Mulvena, who indorsed the same to the plaintiffs, but the defendants did not pay the same. And the plaintiffs claim 200*l.* and interest on 154*l.* 0*s.* 10*d.* of that amount at the rate of 8*l.* per centum per annum from the date of the writ herein until payment of the same or judgment.

Plea. The defendant William George Kirchner says that the promissory note sued on in the declaration is in the words and figures following, and not otherwise, that is to say :—

“ Due 8th May, 1887.

“ 5th January, 1887.

“ 154*l.* 0*s.* 10*d.*

“ Four months after date I promise to pay Mr. B. Goldsmith or order the sum of 154*l.* 0*s.* 10*d.*

“ Value received.

“ Payable at the L. C. Bank, }
Sydney }

C. J. KIRCHNER
per W. KIRCHNER”

And that the said Catherine Jane Kirchner and William Kirchner in such note mentioned are the defendants herein.

Replication. The plaintiffs, as to the defendant W. G. Kirchner's plea, say that the defendant, C. J. Kirchner, was at the time of the making of the said note, and at the commencement of this action, the wife of the said defendant, W. G. Kirchner.

[Replication to the plea of coverture by the defendant, C. J. Kirchner. The plaintiffs freely here in Court say that they will not further prosecute their suit against the said C. J. Kirchner ; therefore, let the said C. J. Kirchner be acquitted of the premises in the said declaration mentioned, and go thereof without day, etc.]

Demurrer to replication, by the defendant W. G. Kirchner. The points marked for argument being that the replication is no answer to the plea, on the following amongst other grounds :—
1. That it is a departure from the declaration. 2. That it shows the promissory note sued on was not a joint note. 3. That it shows the promissory note was not made by the said defendant.

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4. That this action ought not to have been brought against either or both of these defendants. 5. That the plaintiffs convert their joint cause of action into one, against a single defendant.

The COURT called on

Pring (for the plaintiffs), in support of the replication. He cited *Kelner v. Baxter* (1). He also relied upon sec. 19 of the *Absent Defendants Act*, 4 Vic. No. 6 (2).

Lingen (for the defendant) in support of the demurrer. There was no promise by the defendant here, as there was in *Kelner v. Baxter* (1). [He also cited *Bylt v. Morrel* (3).] Husband and wife could not be "joint contractors" within sec. 19 of 4 Vic. No. 6; besides, that section only referred to the time of trial, and could not apply to amendments on demurrer.

The CHIEF JUSTICE. I am of opinion that there should be judgment for the defendant. The action is brought against two defendants. The plea simply sets out a promissory note. It is signed "C. J. Kirchner, per W. G. Kirchner." To that plea the plaintiff has replied that Catherine Kirchner was, at the time of the making of the note, the wife of W. Kirchner. That replication has been demurred to on several grounds, and I am of opinion that the demurrer must be sustained.

It is in point of fact the promissory note of Catherine Kirchner, and not of William Kirchner. In *Byles on Bills* (10th Ed.), p. 36, the law is thus stated:—"An agent will be personally liable to third persons on his drawing, indorsing, or accepting, unless he either signs his principal's name only, or expressly state in writing his ministerial character, and that he signs only in that character; 'unless,' to use the words of Lord *Ellenborough*, 'he states upon the face of the bill that he subscribes it for another;

(1) L.R. 2 C.P. 174

(2) 4 Vic. No. 6, sec. 19: "And be it enacted that after the passing of this Act, in all cases where two or more persons shall be sued as joint contractors, the plaintiff shall be entitled to a

judgment (or to a verdict and judgment, as the case may be) against such of the defendants as shall appear to be liable, although one or more of the persons made a defendant or defendants shall appear not to be liable."

(3) 12 A. & E. 745.

unless he says plainly 'I am a mere scribe.'" Here W. Kirchner has said, "I am a mere scribe."

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On the promissory note itself W. Kirchner is not liable, because he enters into no contract; and he signs for a person who, as far as power to make a contract is concerned, has no existence at all.

In *Kelner v. Baxter* (1) there was a contract made by the defendants with the plaintiff on behalf of other persons. It was made on behalf of a company which was subsequently incorporated, and it was held that as there was no company in existence at the time the contract was made, it would be wholly inoperative unless it were held to be binding on the defendants personally.

On the other point, also, that this is a declaration on a joint contract, and that the replication is a departure, I think the replication is bad. S. 19 of the *Absent Defendants Act* (4 Vic. No. 6) does not apply to a case like this. It was never supposed to refer to any time except at the trial. And in no case can husband and wife be sued as joint contractors. They may be joined in certain cases for conformity, but judgment is recovered against the husband only. Upon these grounds I think our judgment should be for the defendant.

SIR G. INNES, J. I concur. I prefer to base my judgment upon the construction of the statute; that is, that the 19th section of 4 Vic. No. 6 does not apply to this case. As to the other ground, I cannot help thinking that it is fairly arguable whether *Kelner v. Baxter* (1) does not apply. However, it is not necessary to decide that.

STEPHEN, J. I agree that the *Absent Defendants Act* does not apply to a case of husband and wife. During many years' experience as a pleader I never knew of this point having been taken. On the main point I am strongly inclined to agree with his Honour the *Chief Justice*.

Judgment for the defendant.

Attorney for the plaintiffs: *J. M. Curtis.*

Attorney for the defendant: *Marshall.*

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MARSDEN AND ANOTHER v. M'ALISTER AND OTHERS.

August 4. *Real Property Act (26 Vic. No. 9), ss. 33, 40, 115, subs. 5—Certificate of title—Error in survey—Misdescription of boundaries—Encroachment on adjoining land—Certificate not conclusive evidence.*

The C.J.
Innes J.
and
Stephen J.

J. M. applied for and obtained a certificate of title to certain lands described in the application and the certificate, all formalities required by the *Real Property Act* having been duly complied with. Some years after it was discovered that a portion of defendants' land was, owing to a mistake made in the survey, included in the certificate issued to J. M. The defendants claimed the land under Crown grant and various deeds of a date prior to the issue of the certificate to J. M. The plaintiffs, devisees of J. M., set up that under the *Real Property Act* (26 Vic. No. 9), s. 33, the certificate issued to J. M. was conclusive evidence of his ownership.

Held, that s. 40 of the *Real Property Act* must be read as a proviso of s. 33.

Held also, that the present case came under s. 115, sub-sec. 5, of the *Real Property Act*, and that plaintiffs were therefore not entitled to succeed.

THIS was an action brought in form to recover damages for an alleged trespass by the defendants in the erection of a fence on land claimed by the plaintiffs, the real object of the action being to determine the ownership of a certain portion of land claimed by both plaintiffs and defendants. The facts of the case were fully stated in a special case submitted for the opinion of the Court, and were as follows:—

One James Marsden, the predecessor in title of the plaintiffs, was the owner of certain land situated at Stratharrd, in the county of Argyle, and in the year 1870 applied to have the same brought under the *Real Property Act* of 1862. The title was passed, the usual notices to adjoining proprietors were issued (though the defendants, who were owners of adjoining land on the southern side, were under the impression that they had received no notice), and no caveat or objection being lodged, a certificate of title purporting to be a certificate for all the land comprised in the said application, was issued to James Marsden.

Some years after the issue of the certificate of title, the defendants discovered that the description of land in the certificate included a strip of land claimed by them as being included in the description of their land in the Crown grants and subsequent conveyances, and it was on this strip of land that

the alleged trespass took place. It was admitted by both parties that but for the existence of the certificate of title issued to James Marsden, the defendants would have had the better title to the said strip of land. It was believed that the error arose through an erroneous survey, the surveyor having taken a commencing point 14 chains too far south. The consequence of the mistake made by the surveyor was, that James Marsden, while obtaining no more than the proper *area* of land, obtained that area in a wrong *position*, viz., 14 chains too far to the southward, an area of land equal to the land wrongly comprised within his southern boundary being wrongly excluded from his boundary on the north.

James Marsden died on the 24th of May, 1871, and the plaintiffs, the trustees of his will, were duly registered as proprietors by transmission of the land comprised in the said certificate. The plaintiffs' contention was, that having a certificate of title under the *Real Property Act* for the land in dispute, they were absolutely entitled to the same. The defendants, on the other hand, contended that as a mistake had been made in the description of the land comprised in the said certificate, the rights acquired by them under the Crown grant and subsequent conveyances, were not taken away by the issue of the certificate of title.

The portion of land in dispute comprised about 200 acres.

Donovan (Salomons, Q.C., with him) for the plaintiffs. Section 33 of the *Real Property Act* (1) standing alone makes the

(1) 26 Vic. No. 9, s. 33.—“Every certificate of title, duly authenticated under the hand and seal of the Registrar-General, shall be received in all Courts of Law and Equity as evidence of the particulars therein set forth, and of their being entered in the register book, and shall be conclusive evidence that the person named in such certificate of title, or in any entry thereon, as seized of or as taking estate or interest in the land therein described, is seized or possessed of or entitled to such land for the estate or interest

therein specified, and that the property comprised in such certificate of title has been duly brought under the provisions of this Act, and no certificate of title shall be impeached or defeasible on the ground of want of notice, or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application, or in the proceedings pursuant thereto, by the Commissioners or by the Registrar-General.”

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certificate of title conclusive evidence that the person named in such certificate is the owner of all the land comprised in the description set out in such certificate, and provides that such certificate cannot be impeached on the ground of any error, omission, or informality in the application for such certificate. In this case the application was clearly in error as to the 200 acres in dispute.

[The CHIEF JUSTICE. In the application is the land marked out by metes and bounds ?]

Yes ; and the description of the land in our application comprised the land in dispute here. S. 40 of the Act (2) is intended to apply only to those cases where the description of the land in the certificate does not correspond with the description in the application. In such a case the applicant cannot be prejudiced by the mistake, nor can he take advantage of it. Provision has been made in this Act for the protection of owners of land contiguous to that for which a certificate is sought. S. 14 (3)

(2) 26 Vic. No. 9, sec. 40:—"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register book constituted by the grant or certificate of title to such land but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior certificate of title, or under a prior grant registered under the provisions of this Act, and except as regards the omission or misdescription of any right-of-way or other easement created in or existing upon any land, and except so far as regards any portion of land that

may by wrong description of parcels or of boundaries be included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value."

(3) 26 Vic. No. 9, sec. 14:—"Every such applicant shall, when making his application, deposit with the Registrar-General all instruments in his possession or under his control constituting or in any way affecting his title, and in the case of a leasehold a duplicate or certified copy of the lease and of any other instrument under which the applicant claims title, and shall furnish a schedule of such instruments, and also if required an abstract of his title, and shall in his application state the nature of his estate or interest, and of every estate or interest held therein by any other person, whether at law or in equity, in possession or in futurity or expectancy, and whether the land be

provides for due notice of the application to parties whose interests may be affected by the issue of a certificate, and public notices are provided for by ss. 16, 17, and 18. The object of these stringent conditions, which must be complied with before a certificate can be issued, clearly is to give adjacent landowners a right to see that none of their land is included in the application. S. 19 provides (4) that the Registrar-General *shall* issue a certificate of title for *the land* (that is to say, *all the land*) described in such application; and it is a necessary consequence of this provision that the certificate when issued shall be conclusive evidence of the ownership of all the land applied for.

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[The CHIEF JUSTICE. Must not s. 40 be read as a proviso to s. 33?]

S. 33 refers solely to errors or omissions in the application, while s. 40 contemplates omissions or misdescriptions in the certificate.

[The CHIEF JUSTICE. Does the exception in s. 40, as to the omission to mention a right-of-way, come within your argument,

occupied or unoccupied, and if occupied the name and description of the occupant and the nature of his occupancy and whether such occupancy be adverse or otherwise, and shall state the names and addresses of the occupants and proprietors of all lands contiguous to the land in respect to which application is made, so far as known to him, and that the schedule so furnished includes all instruments of title to such land in his possession or under his control, and shall make and subscribe a declaration to the truth of such statement; and such applicant may if he think fit in his application require the Registrar-General, at the expense of such applicant, to cause personal notice of his application to be served upon any person whose name and address shall for that purpose be therein stated."

the time limited in such direction, or under any order of the Supreme Court, any notice forwarded by registered letter as aforesaid shall not be returned to him by the Postmaster-General, and if within the time so limited he shall not have received a caveat as hereinafter described forbidding him so to do, and in any case in which personal notice may be required as aforesaid, if he shall have received proof to his satisfaction that such notice has been served, the Registrar-General shall, pursuant to such directions of the Commissioners, bring the land described in such application under the provisions of this Act by issuing to the applicant, proprietor, or to such person as he or the person applying in his behalf may by any writing under his hand direct, a certificate of title for the same as hereinafter described."

(4) 26 Vic. No. 9, s. 19:—"If within

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that that section applies only to differences between the certificate and the application ?]

That stands on a different footing to the present case. An easement would not necessarily appear on the application, or even on the title deeds. In the case of an encroachment the parties interested are served with notice of the application, whereas in case of a right-of-way there is really no notice. This is the reason of the exception contained in s. 40. The present case is clearly one of error in the application, if the ordinary meaning is given to the word "error."

[The CHIEF JUSTICE. Under ss. 117 and 126 (5), if A.'s land

(5) 26 Vic. No. 9, s. 117 :— Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the provisions of this Act, or by the registration of any other person as proprietor of such land, estate, or interest, or in consequence of any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register book, may in any case in which such land has been included in two or more grants from the Crown, bring and prosecute an action at law for the recovery of damages against such person as the Governor with the advice aforesaid may appoint as nominal defendant, and in any other case against the person upon whose application such land was brought under the provisions of this Act, or such erroneous registration was made, or who acquired title to the estate or interest in question through such fraud, error, or misdescription: Provided always that in every case in which the fraud, error, or misdescription shall occur upon a transfer made for value, the person making the transfer and receiving the value shall be regarded as the person upon whose application the certificate of title was issued to the transferee: And provided further that, except in the case of fraud or of error occasioned by any omission, misrepresentation, or

misdescription in the application of such person to bring such land under the provisions of this Act, or to be registered as proprietor of such land, estate, or interest, or in any instrument executed by him, such person shall upon a transfer of such land, *bond fide* for value, cease to be liable for the payment of any damages which, but for such transfer, might have been recovered from him under the provisions hereinbefore contained; and in such last-mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged insolvent, or cannot be found within the jurisdiction, then and in any such case such damages, with costs of action, may be recovered out of the assurance fund by action against the Registrar-General as nominal defendant.

26 Vic. No. 9, s. 126 :— In case it shall appear to the satisfaction of the Registrar-General, that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or indorsement has been made in error on any grant, certificate of title, or other instrument, or that any such grant, certificate, instrument, entry, or indorsement, has been fraudulently or wrongly obtained, or that any such

is wrongly included in B.'s certificate, B. can bring an action for damages, or apply to have the certificate rectified.]

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Neither course impeaches the certificate. The object of those sections is to compensate the injured person for the wrong done in allowing the holder of the certificate to retain the land under his certificate. If the certificate of title were not upheld it would be a nullity, and there would be no case for compensation. These sections mean that it may be shown that a person has land which he did not apply for. That interpretation reconciles s. 33, s. 40, and s. 115, sub-sec. 5 (6).

[The CHIEF JUSTICE. Section 115 saves the right of bringing ejectment in certain cases. That pre-supposes the legal estate being still in the claimant.]

If the defendants succeed it will be open to any landowner to abstain from lodging a caveat, when he receives notice of an application to bring adjoining land under the Act, and then come years after and impeach the title of the holder of a certificate. The essence of the system of caveats is that if no caveat is lodged before the granting of the certificate, the certificate issues to the absolute owner of the land.

grant, certificate, or instrument, has been so issued, or by whom it has been so obtained, or is retained, to deliver up the same for the purpose of being cancelled or corrected as the case may require; and in case such person shall refuse or neglect to comply with such summons, or cannot be found, the Registrar-General may apply to a Judge of the Supreme Court to issue a summons for such person to appear before such Court or Judge and show cause why such grant, certificate, or other instrument should not be delivered up to be cancelled or corrected as aforesaid; and if such person when served with such summons shall neglect or refuse to attend before such Judge or Court at the time therein appointed it shall be lawful

for such Judge to issue a warrant authorising and directing the person so summoned to be apprehended and brought before a Judge of the Supreme Court for examination.

(6) 26 Vic. No. 9, s. 115:—No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say—sub-sec. 5: The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries as against the registered proprietor of such other land not being a transferee thereof *bond fide* for value.

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Heydon (Owen, Q.C., with him) for the defendants. We contend that s. 33 must be read with s. 40. Section 115 is conclusive in our favour. The party entitled to succeed in ejectment must have the legal estate in the land, and under the Act is regarded as owner of it. It is admitted that our land is included "by misdescription of the boundaries of the plaintiffs' land," and therefore our right to succeed in ejectment is also admitted. If the land had been transferred to a *bonâ fide* purchaser for value, our only remedy would have been an action for damages under s. 117, or the alternative remedy provided by s. 126.

Donovan in reply.

In the course of the arguments the following cases were referred to:—

Phillips v. McLachlan (7) and *Mate v. Nugent* (8).

THE CHIEF JUSTICE. In this case our judgment will be confined to the facts admitted on the special case. It is admitted by the plaintiffs that the portion of land in dispute is included in the Crown grant issued to the defendants' predecessors in title. It is admitted on the other hand that the certificate of title issued to the plaintiffs also comprises the land in question, and the case is stated with a view of raising the broad question whether the plaintiffs or the defendants are owners of the piece of land in dispute.

This question rests mainly on the construction to be put upon ss. 33, 40, 115, 117, and 126 of the *Real Property Act* of 1862. In my opinion s. 33 can only be read with ss. 40 and 115, and those sections must be regarded as provisos to s. 33, and as incorporated with it. Taken by themselves, the words of s. 33 are very strong, and would, I am inclined to think, bear the meaning which Dr. *Donovan* contends should be given to them. But in my opinion the arguments adduced on behalf of the defendants on s. 40 are unanswerable. If two certificates were issued for the same piece of land, it is clear that neither of them could be conclusive evidence that the person named therein was owner of the land therein described. I do not think that

s. 40 is inconsistent with s. 33, but that it is an exception or proviso to that section, and must be read with it. If there were any doubt about this being the correct view, sub-section 5 of s. 115, in my opinion, makes the matter abundantly clear. This shows clearly that where there is a misdescription, although the certificate may be granted, nevertheless the certificate has not taken the legal estate; and, therefore, where land is erroneously included in a certificate of title, the legal estate still remains in the original owner of the land, who is entitled to bring an action of ejectment, founded upon such legal estate, to recover such land from the person who so holds it erroneously under the certificate of title. Under these circumstances, it appears to me that the 33rd and 40th sections of the Act must be read together. It follows, therefore, that the original proprietor having the legal estate can recover from the holder of the certificate so long as the land remains in his possession; but if it be parted with to a *bonâ fide* transferee, then the land cannot be recovered, the remedy then being under the 117th section to recover damages against the person upon whose application such land was brought under the provisions of the Act. In this manner both the person in possession of the land before the certificate is issued and the innocent purchaser from the holder of the certificate are protected, and so far as I can see, the usefulness of the Act is in no way impaired, one of its main objects being to protect innocent purchasers from sustaining injury owing to defects in the title of the person from whom they purchased. I am of opinion that judgment should be for the defendants with costs.

SIR G. INNES, J. I am of the same opinion. It is difficult to conceive any words more clear or more strongly in favour of the plaintiffs' contention than the words of s. 33 read by themselves. It is, I think, very much to be regretted that the Legislature did not introduce into that section the exceptions contained in other parts of the Act. Unless we treat s. 33 as containing some such words as "except as hereinafter provided," and s. 115 as one of the exceptions contemplated by the use of those words, I do not see how it is possible to reconcile those two sections. As to s. 40, I express no opinion, though *Mate v. Nugent* (9) clearly

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The C.J.

1887. shows that that section is to be regarded as engrafted on s. 33.
MARSDEN It would be a violent presumption to suppose that the Legislature
v.
MCALISTER. intended, notwithstanding the safeguards provided by the Act,
Innes J. to deprive the rightful owner of his land by the mere efficacy of
a certificate of title. It appears to me to be impossible for the
plaintiffs to get over the clear language of s. 115, by sub-section
5 of which a person in the position of the defendants here is
enabled to bring ejectment against a person in the position of
the plaintiffs. This section also operates to protect the purchaser
for value from any injustice. I concur in thinking that s. 115
is to be read as an exception to s. 33, and that therefore
judgment should be for the defendants with costs.

STEPHEN, J. I should have been glad to have time to consider
my judgment in this case, as the decision which we have arrived
at seems to affect the value of certificates of title. This Act
was, as I apprehend, passed to prevent conflicting claims to land
being set up, and not with a view to enabling a person in whose
certificate land was included by mistake to retain possession of
that land. In fact, the whole purview of the Act seems to show
that it was intended to prevent people filching land. It seems
to me that the Legislature has by s. 33 and s. 40, which must I
think be read together, clearly shown its intention to be that
persons shall not be prejudiced owing to the misdescription of a
parcel of land by an applicant for a certificate. I am unable to
give to the word "error" the meaning imputed to it by Dr.
Donovan, and I concur in thinking that the defendants are, not-
withstanding the certificate, entitled to their land.

Judgment for the defendants.

Attorney for plaintiffs : *A. M. Betts* (Goulburn).

Attorneys for defendants : *Slattery & Heydon*.

In re HELEN PARK WILSON.

1887.

Crown Land Act, 1884 (48 Vic. No. 18), ss. 21 (IV.), 101, 140—Lands reserved or set apart for cities, towns, or villages—Suburban lands attached thereto—Conditional purchase, within limits, lapsing—Not open to selection—Practice—Right of reply.

August 5.

The C.J.
Faucett J.
and
Innes J.

In 1882 S. took up a conditional purchase of 195 acres which was declared lapsed in February, 1886. In March, 1885, a reserve for "Cities, Towns, or Villages," under s. 101 of the *Crown Lands Act, 1884* (48 Vic. No. 18), was proclaimed, and the limits of the "Suburban Lands" to be attached thereto were also notified in the *Gazette*. Within these limits S.'s 195 acres were situated. On S.'s selection being declared lapsed in 1886, W. applied to select it, but the Land Board refused the application.

Held, that the decision of the Land Board was right, as the land being within the limits of the "suburban lands" was exempt from conditional sale under subs. 4 of s. 21 of 48 Vic. No. 18.

Edols v. Tearle (7 N.S.W. L.R. 374) followed.

In cases stated by the Minister under s. 140 of 48 Vic. No. 18, counsel for the Crown has the right to reply.

SPECIAL case stated for the opinion of the Supreme Court under s. 140 of the *Crown Lands Act, 1884*, by Mr. H. Copeland, Minister for Lands :—

On the 1st April, 1886, Helen Park Wilson applied for a conditional purchase of 195 acres, under the 47th clause of the *Crown Lands Act, 1884*, which application was refused by the Metropolitan Land Board, sitting at Penrith, on the 7th of July last, as being within the limits of the suburban lands of the village of Brasfort. Against this decision Helen Park Wilson has appealed on the ground that the land being an area covered by a conditional purchase which was declared lapsed on the 27th February, 1886, was not open to or affected by the notification or proclamation of the suburban lands referred to. It appears that on the 17th August, 1882, R. F. Stubbs applied under the 19th clause of the *Crown Lands Alienation Act, 1861*, for a conditional purchase of 195 acres, which selection was declared lapsed on the 27th February, 1886. While this conditional purchase stood good in the books of the department, the following notice appeared in the *Government Gazette* of the 20th March, 1885: "Department of Lands, Sydney, 20th March, 1885.

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Cities, Towns, and Villages. His Excellency the Governor, with the advice of the Executive Council, directs it to be notified that the following portions of Crown lands are declared to be reserved and set apart as cities, towns, and villages, respectively, and that the limits of the suburban lands to be attached thereto are defined as hereinafter in accordance with the provisions of the *Crown Lands Act*, 1884.—J. S. FARNELL. Suburban lands at Brasfort, county of Cook, parish of Jamieson, about 6080 acres," (here follows description of boundaries).

Subsequently to such notification appearing, namely, on the 27th February, 1886, R. F. Stubb's selection was declared lapsed; and on the 1st of April, 1886, the said Helen Park Wilson selected the same land under the 47th clause of the *Crown Lands Act*, 1884, which has been disallowed by the Land Board, and is the subject of this reference. Mr. J. P. Abbott, solicitor, who appeared for the appellant at the Appeal Court, argued that under the 101st clause of the *Crown Lands Act*, 1884, only Crown lands at the time could be included in the suburban lands at Brasfort, proclaimed on the 20th March, 1885, and that the lands thereof were defined thereunder, the area being specifically stated as about 6080 acres, and to add such an area as 195 acres thereto, without a fresh proclamation, would be contrary to the provisions of that clause. Mr. Abbott further contended that the decision of the Supreme Court in Banco in the cause of *Murphy v. Cooke*, Silverton Case (1), heard on the 8th February, 1886, did not apply.

Owing to the area of the suburban lands at Brasfort having been notified as about 6080 acres, there appears to be some doubt whether the 195 acres, being within the limits of such suburban lands, became, on the forfeiture of the conditional purchase, part thereof, without a fresh notification to that effect appearing in the *Government Gazette*, and therefore was open to conditional purchase. The interpretation clause describes suburban lands to be "Crown lands," declared in the *Gazette* to be suburban by the Governor and the Executive Council. It is clear that this land was not open to selection by Wilson until Stubb's conditional purchase was declared lapsed, but, on

the lapsing as aforesaid, the land simultaneously became Crown lands. The question, then, is whether the moment it became Crown land it was not absorbed in the suburban area, and therefore not open to conditional purchase; in other words, as it became Crown land before it was open to selection, did it not by becoming Crown land cease to be open to selection by virtue of the prior *Gazette* notice declaring the suburban boundaries which embraced all the Crown lands within such boundaries?

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The case is now referred for decision by the Supreme Court under the provisions of the 140th clause of the *Crown Lands Act*, 1884.—(Signed) HENRY COPELAND, Secretary for Lands.

Barton, for the appellant, had already argued the case for the appellant, on March 1st, when, no counsel appearing for the Crown, the Court adjourned the case in order that it might be argued on behalf of the Crown.

Accordingly, on August 5th,

August 5.

Salomons, Q.C., and *C. B. Stephen* appeared for the Crown. The land being within the boundaries of the suburban lands is not open to selection: *Murphy v. Cooke* (1).

The case is governed by the decision of the Court in *Edols v. Tearle* (2): where land, within the boundaries of a leasehold area, which had been selected before, and forfeited after, the division of the run, was held to be not open to re-selection.

[The CHIEF JUSTICE. There is this difference: *Edols v. Tearle* (2) was decided on subs. III. of s. 21, whereas here the land was reserved or set apart under s. 101 (3).]

Stubbs had a free selection. While that held good the Government proclaimed as suburban lands an area within the limits of which that free selection was situated. The selection

(2) 7 N.S.W. L.R. 374.

(3) 48 Vic. No. 18, sec. 101 :—The Governor may, by notice in the *Gazette*, declare what portions of Crown lands shall be reserved and set apart as sites for cities, towns or villages, and may define the limits of the suburban lands to be attached thereto and to any existing city, town or village, and may

in like manner declare what portions of Crown lands shall be temporarily reserved from sale pending survey or determination by him of the portion to be set apart for any public purpose, or for commonage, or for population areas; and all lands so declared shall be reserved accordingly until revoked or altered in like manner . . .

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becoming forfeited, the land in the ordinary course became Crown lands again, but being within the limits of the area so proclaimed, was not open to selection. Though the words used are "reserved or set apart," and not "comprised," as in *Edols v. Tearle* (2), the result is the same. The only way in which lands can be "reserved or set apart" is by defining the limits within which they are "comprised."

Barton for the appellant. Suburban lands can only be reserved out of Crown lands: s. 101: therefore lands which can be so defined can only be Crown lands, and not land which has been free-selected. As to the argument based upon the probable intention of the Legislature, I will refer to *Logan v. Courtown (Earl)* (4), where Lord *Langdale*, M.R., says: "I need not say that I can know nothing of the intention of the Act, except from the words in which it is expressed applied to the facts existing at the time." That is the principle which must be applied to every case. Here the land in question was not Crown lands when the reservation of the suburban area was proclaimed. This land being the subject of a subsisting selection, could not be included in the proclamation. *Edols v. Tearle* (2) is distinguishable. Under s. 21, subs. (III.), the land comprised within a leasehold area is not open to selection, i.e., all the land on one side of a given line. S. 101 merely empowers the Government to define the limits of suburban lands. Any effect attempted to be given to s. 101 is taken away by reference to s. 21, because land which is alienated cannot be the subject of alienation. As to *Murphy v. Ooolee* (1), that was a decision under s. 26 of the *Mining Act* (37 Vic. No. 13). S. 22 of that Act provides for the occupation of Crown lands under business licenses; and s. 26 provides that Crown lands may be reserved from such (among other kinds of) occupation. Land so occupied at the time of the proclamation, and within the notified limits, becoming vacant, the Court held that it could not be taken up again under a business license. The principle of that decision was that the land had never lost its character of Crown lands. In the present case the land had lost the character of Crown lands at the time of the proclamation

of the suburban area. S. 101 gives no power to deal with land not at the time Crown land. This proclamation does not do away with the distinction between subs. (III.) and subs. (IV.) of s. 21 (5).

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[The CHIEF JUSTICE. Subs. (IV.) is manifestly inaccurate. That must refer to s. 101. In point of fact, lands are not set apart or reserved as "suburban" lands. Lands are set apart for "town" lands, and the Governor may define the limits of the "suburban" lands to be attached thereto. Must you not read subs. (IV.) as "lands within the limits defined as suburban lands" ?]

But in subs. IV. they are all on the same footing.

Stephen rising to reply,

Barton objects. I am for the appellant. The Crown has no right of reply.

[The CHIEF JUSTICE. The case is stated by the Minister ; therefore the Crown has the right of reply.]

Stephen in reply. Town and suburban lands are on a different footing to ordinary Crown lands. S. 61 provides special regulations for their sale by auction. It would be against the object and intention of the Act that lands which have become valuable by reason of their contiguity to towns and villages should be open to be taken up in the quantity and at the price of ordinary Crown land.

The CHIEF JUSTICE. I am unable to distinguish this case from the principle laid down in *Edols v. Tearle* (2), though that case turned upon the meaning of the word "within" in sub-section III. of s. 21 of the Act. In that case it was held that the words in s. 21 "land comprised within leasehold areas" were not restricted to land which might be leased to the runholder, but included all land

(5) 48 Vic. No. 18, sec. 21 :—Crown lands belonging to any of the classes hereinafter specified shall be exempt from conditional sale under this part. (III.) Lands comprised within leasehold areas notified under the provisions of Part IV. (IV.) Land reserved or set apart for town or suburban lands or for village sites.

1887. within the boundaries of the leasehold area. The words in this case are not the same. The only difficulty is caused by the different phraseology of s. 21, subs. IV., and s. 101. Here the selection was made before the Act of 1884 came into force. The *Gazette* notice strictly follows the terms of s. 101, one of the objects of which was to define the limits of the suburban lands to be attached to the reserves for cities, towns and villages. The selection having been forfeited, the land became Crown land within the limits of the suburban lands attached to the land set apart for the village of Brasfort. I think the case, therefore, falls exactly within the decision of *Edols v. Tearle*, as at that time the land was within the limits defined as the limits of the suburban lands; and we decide accordingly that the land was not open to conditional purchase.

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The C.J.

FAUCETT, J. I am entirely of the same opinion. The difficulty arises partly from the difficulty of the subject and partly from the words in which the sections are drawn up. That being so the duty of the Court is to give a fair construction and operation to the Act. If we were to allow Mr. *Barton's* argument to prevail, we should be destroying the fair and reasonable meaning of the Act. The Act says that the Crown may mark out the limits of lands attached as suburban lands to towns and villages. It is our duty to see, if we can, what the Legislature intended. It clearly means that all Crown lands within the notified limits are to be regarded as suburban areas. If land within those limits subsequently becomes Crown lands, it will not be open to selection.

SIR G. INNES, J. I am of the same opinion, although, no doubt, it is a very arguable question. It seems to me that the Land Board took the right view of the case in the first instance, and that we ought to give effect to their decision. I agree with their Honours that it is in accordance with the whole policy of the Act to decide that no lands within the limits of these suburban areas are open to free selection. The *Crown Lands Act* of 1861 contained a similar enactment, using the words "population area." Under that Act when a conditional purchase within the

limits of a population area lapsed it was not open to selection. So here the land in question was not open to selection on the 1st April, 1886, when the appellant selected it.

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Innes, J.

Appeal dismissed with costs.

Attorneys for the appellant: *Abbott & Allen.*

Ex parte COUNSEL.

August 25.

Fugitive Offenders (Imperial) Act (44 & 45 Vic. c. 69), ss. 9, 13, and 19—Destitute Persons (New Zealand) Act (41 Vic. No. 44), ss. 16, 17, and 26—Destitute Persons (New Zealand) Act Amendment Act (47 Vic. No. 26), s. 2—Arrest for non-payment of money under maintenance order—"Trivial" offence under s. 19 of 44 & 45 Vic. c. 69—Discharge ordered upon terms.

The C.J.
Innes J.
and
Stephen J.

C. was arrested on an extradition warrant issued, under s. 13 of the *Fugitive Offenders Act* (44 & 45 Vic. cap. 69), by a magistrate of the colony of New Zealand, and properly indorsed in this colony, charging him with having disobeyed an order made under the provisions of the *Destitute Persons (New Zealand) Act* of 1877, adjudging him to pay £1 per week for the maintenance of his wife, and alleging that £28 was then due and owing. By s. 26 of the latter Act, C. was liable, for the non-payment of this money, to six months' imprisonment. This offence was, therefore, one "punishable by law" within s. 13 of 44 & 45 Vic. cap. 69; and it was admitted that by an Order in Council, made under s. 12 of that Act, New South Wales and New Zealand had been included in the same group of British possessions.

The magistrate before whom C. was brought ordered that he should be returned to New Zealand, but admitted him to bail pending an appeal to the Supreme Court.

Held, on appeal (INNES, J., *dissentiente*), that as the offence charged was only the non-payment of money ordered to be paid, it was a "trivial offence," within the meaning of s. 19 of 44 & 45 Vic. cap. 69, and ordered C.'s discharge upon terms.

Per tot. cur. The justice of the case would be met by ordering C. to pay the money due and certain costs and expenses, on his entering into a bond for the discharge of future payments.

Per INNES, J. The words "or otherwise" in s. 19 of 44 & 45 Vic. cap. 69 were sufficient to warrant the Court in making such an order.

THIS was an appeal (referred by Stephen, J., in Chambers to the Full Court) from a decision of a stipendiary magistrate under the 19th section of *Fugitive Offenders Act* (44 & 45 Vic. cap.

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69), ordering the arrest and return to the colony of New Zealand of Joseph Lawrence Counsel under the following circumstances:—

It appeared that Counsel, who is a travelling agent for an insurance company in Sydney, had been arrested at Cootamundra on a warrant from New Zealand, charged with neglecting to pay the sum of 28*l.* under two orders made in Dunedin for the maintenance of his wife and child under the *Destitute Persons* (New Zealand) *Act* (41 Vic. No. 44), ss. 16, 17, and 26 (1). Under a later Act passed by the New Zealand Legislature in 1883 (47 Vic. No. 26, s. 2), any person, while in disobedience of an order for maintenance, going to reside in another colony, becomes liable to punishment by 12 months' imprisonment with hard labour; and as the appellant had left New Zealand without complying with the order made against him, a warrant was issued, which was backed in this colony, and he was arrested. Mr.

(1) *Destitute Persons Act* (New Zealand), 1877 (41 Vic. No. 44), s. 16:—
“When any husband unlawfully deserts his wife, or leaves her without, or wilfully fails to provide her with, adequate means of support, or when any father or mother deserts his or her children under the age of fourteen years, or wilfully leaves them without, or wilfully fails to provide them with, adequate means of support, if complaint thereof be made on oath to any justice, by the wife or by any reputable person on her behalf, or, in case of the children, by the mother, or any reputable person, such justice may issue his summons to such husband, father, or mother to show cause why he or she should not support his wife or his or her children.”

S. 17:—“Whether the defendant be present or not, any resident magistrate shall, in a summary manner, inquire into the matter of the complaint; and if he be satisfied that the wife or the children, as the case may be, are deserted, or are, in fact, without adequate means of support, and that the husband, or the father or mother, is able to maintain her or them, or to contri-

bute to her or their maintenance, such resident magistrate shall make an order in writing, directing him or her to pay either weekly or monthly, at his discretion, and to such person and in such manner for her or their maintenance as the resident magistrate thinks fit, such moderate sum or allowance, not exceeding twenty shillings per week, for such wife or any one child, until such child arrives at fourteen years of age, as he considers fit. In addition to making any such order, the resident magistrate may commit the defendant to any gaol for any period not exceeding six calendar months, with or without hard labour.”

S. 26:—“Any resident magistrate may at any time inquire in a summary way into any allegation of disobedience of any order made under this Act, and may for the purpose summon and examine all proper parties and witnesses, and may either commit the offender to gaol for any period not exceeding six calendar months, with or without hard labour, or may impose upon such offender a fine of not exceeding fifty pounds.”

Slattery appeared for the defendant at the Police Court, and submitted that the offence was a "trivial" one, within the meaning of s. 19 of the *Fugitive Offenders Act* (44 & 45 Vic. cap. 69) (2), and the defendant should be discharged on payment of the money due, and on entering into a bond, with sureties, to secure future payments.

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The magistrate, however, it being represented before him that the prisoner had been arrested for an offence under the New Zealand Act of 1883, which, being punishable with 12 months' imprisonment with hard labour, would have brought the case within the first part of the *Fugitive Offenders Act*, held that he had no alternative but to order the prisoner's return to New Zealand; but he remanded him on bail pending an appeal to the Supreme Court.

It was admitted that this colony and New Zealand had been included in one group by an Order in Council under s. 12, so that the case could be dealt with under Part II. of 44 & 45 Vic. cap. 69.

Salomons, Q.C. (*Armstrong* with him), for the appellant. The case is of a "trivial" nature, within the meaning of s. 19 (2) of the *Fugitive Offenders Act* (44 & 45 Vic. cap. 69), under which the Court may refuse to order the return of the fugitive. Justice can be done by the imposition of terms as provided by the section.

O. B. Stephen for the Crown. Can it be said that the offence for which the appellant has been arrested is of a "trivial nature"? Is a person to be allowed to extricate

(2) 44 & 45 Vic. cap. 69, sec. 19:—
 "Where the return of a prisoner is sought or ordered under this part of the Act, and it is made to appear to a magistrate or to a superior Court that (by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice, or otherwise), it would, having regard to the distance, to the facilities of communication, and all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or at the expiration of a certain period, the Court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or Court seems just. Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior Court,"

1887. himself from his position by offering to pay the money when he is arrested under a warrant? It is like saying that a person charged with larceny can purge his offence by offering to return the goods stolen. As a matter of fact, the depositions show that the prisoner is living in adultery in Cootamundra. The Courts will be anxious to be auxiliary to each other in bringing offenders to justice. It is not an ordinary debt, but an obligation of a much higher character.

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COUNSEL.

Salomons, Q.C., in reply. It is a mere monetary obligation. We have nothing to do with the moral aspect of the case.

The CHIEF JUSTICE. In this case it appears that an order was made under the 17th section of the New Zealand Act (41 Vic. No. 44), by which the appellant was directed to pay £1 per week towards the support of his wife, the first payment to be made on the 11th February, 1886, and from that date to pay £4 on every fourth Thursday. It further appears that the appellant made some payments under that order—the amount not being very clear—and he afterwards came to this colony. That being the state of the case, it appears that after coming to this colony the appellant ceased to make any further payments under the order, and accordingly application was made at the suit of the wife, under the 26th section of the same Act, which enabled the resident magistrate at Dunedin to make an order committing the offender to prison for any period not exceeding six months, with or without hard labour, or to impose a fine not exceeding 50*l*. Now, under the 39th section of the same Act, the justice had power to issue a warrant to bring the offender before him in order to answer the offence alleged in the 26th section. It appeared that the justice in New Zealand did issue a warrant, and that warrant having been brought here, has been backed by a justice of this colony under the provisions of the 13th section of the 44th & 45th Vic. chap. 69 (*Fugitive Offenders Act*), which is an Imperial Act. That Act appears to me to be divisible in fact into three distinct parts. The first part is one which is in force in every portion of Her Majesty's dominions with respect to the offences which are enumerated in the 9th section of the Act. The second portion of the Act has relation to certain groups of

colonies which may be defined by an Order in Council made by Her Majesty, and it is under that portion of the Act that this particular proceeding has been taken. It is admitted that this colony and New Zealand form portion of the group declared by an Order in Council under the 12th section of the Act. I at first thought that the 32nd section of the Act overrode all the rest of the Act except the first part, but upon looking more closely into the matter I see that the 32nd section has reference to those portions of British possessions, or rather to offences committed in those portions of British possessions, which do not come under the first part of the Act, and in colonies which do not come under the second part of the Act, so that the 32nd section of the Act may be considered as introducing a third element into the Act, with which we have in the present case nothing to do.

New Zealand and this colony, being in one group, come under the second portion of the Act. This warrant having been backed in this colony, and having been issued against a person because of his disobedience of an order under a New Zealand Act, the question arises, under the 19th section of the *Fugitive Offenders Act*, whether this Court can interfere and relieve the appellant under that section. Well, after giving this case the fullest consideration, I am of opinion that we can afford relief to the appellant under certain conditions, and at the same time do no injustice to the person who is interested in this order.

Now, the 19th section of the Act is almost in exactly similar terms to the 10th section, except that the 10th section refers the matter directly to a superior Court, as defined by the definition clause of the Act, while the 19th section refers the matter to a magistrate, and, on appeal, to the superior Court. It appears that this matter was placed before the magistrate as if the appellant had been accused of an offence within the Act of 1883, which would come within the 9th section of the *Fugitive Offenders Act*, the offence being punishable with a year's imprisonment with hard labour; but, on looking more carefully into the matter, and our attention having been drawn to the warrant, it appears to me that the offence with which the appellant was charged was not an offence under the New Zealand Act of 1883, but one under

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Ex parte
COUNSEL.

The C.J.

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STRICKLAND v. McCULLOCH.

Sept. 5 & 8. *Contract—Sale of sheep—"Sheep shewn by seller"—Construction of contract—Misdirection—Measure of damages.*

Faucett J.
Innes J.
and
Deffell J.

By an agreement in writing, dated July 23rd, 1885, the defendant agreed to buy sheep of certain quality and breeding, "which were shewn by the seller to Mr. B. on purchaser's behalf." B. had reported to the defendant in May, and again on July 20th, that he had seen all the sheep, and approved of their quality and breeding; and the plaintiff assured the defendant before the contract was signed, that he had shewn the sheep to B. In September, when B. went on defendant's behalf to mark the lambs and arrange for taking delivery, he told the plaintiff that the sheep then pointed out to him as those sold to the defendant were not the same which he had seen before; and he wrote to defendant saying that the sheep were not up to sample. In an action against the defendant for refusing to accept the sheep, it appeared that B. only saw 900 of the sheep in May, and about 2000 in July; but it was proved that on both occasions the plaintiff afforded him ample opportunity of seeing all the sheep, if he had so desired. Verdict for plaintiff; damages, 978*l*.

Held, on motion to enter a nonsuit or for a new trial, that the Judge was right in refusing to nonsuit, as there was evidence of statements by B. that he had seen the sheep.

Held, also, that the evidence shewed that the contract had been fairly and reasonably complied with by the plaintiff, who was not bound to shew B. every single sheep.

Held, also, that it would not have been a wrong direction to have told the jury that it was not necessary that all the sheep should have been shewn to Buchanan; but that a direction that it was not necessary for B. to have seen more sheep than he saw in May, or that it was sufficient if he had seen only part of the sheep, would have been wrong.

Held, also, that the Court could only look at the contract itself, and that therefore the Judge was right in disallowing a question put by defendant's counsel to defendant, "Would you have entered into the contract unless you had been assured by the plaintiff that Buchanan had seen all the ewes?"

Held, further, that the proper measure of damages was the difference between the contract price and the price at which the sheep were sold at auction, although they were bought in by the plaintiff, and afterwards realised higher prices.

Per Faucett, J., following the *Prudential Assurance Co. v. Edmunds* (L.R. 2 App. Cas. at p. 507). Where a Judge has wrongly or imperfectly directed a jury, the verdict, whether right or wrong, must be set aside.

THIS was an action brought by Josiah John Strickland against Andrew Hardie McCulloch for not accepting certain sheep.

The plaintiff was a dealer in sheep, and owner of Bundaburra Station, near Forbes, and the defendant, a solicitor, was the owner of a sheep station called Colane, on the Bogau River.

The declaration stated that by an agreement dated the 25th July, 1885, it was agreed that the plaintiff should sell to the defendant certain ewes and lambs in the said agreement mentioned and therein more particularly described at the price of 15*s.* each for the said ewes, upon the terms and conditions, amongst others, that the plaintiff should, upon the 1st October, 1885, deliver the said ewes and lambs to the defendant, and that the defendant should thereupon accept the same, and pay the plaintiff the said price thereof. Breach :—That the defendant did not accept the said ewes and lambs, but wholly refused to do so. Damage :—Loss and expense in preparing to carry out the contract on the plaintiff's part and in keeping the said sheep, and loss of the price of the same. 2. Common counts. And the plaintiff claimed 442*5*l.

The defendant pleaded (*inter alia*)—3. That the plaintiff was not ready and willing to deliver the said ewes and lambs to the defendant according to the said agreement. 4. That by the said agreement the plaintiff agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, certain ewes which were then lambing, and which were shewn to a certain Mr. Buchanan on the defendant's behalf, and the defendant says that the ewes which the plaintiff offered to deliver to the defendant in pursuance of the said agreement were not those which at the time of the said agreement were then lambing, and were not those which were shewn to the said Mr. Buchanan on the defendant's behalf.

[A fifth plea, that the defendant was induced to enter into the alleged agreement by the false and fraudulent representations of the plaintiff as to the breeding of the said ewes and lambs, was withdrawn at the trial.]

Joinder of issue.

The case was tried on the 16th, 17th, 18th, and 19th March, 1886, before the late Sir James *Martin*, C.J., and a jury of four.

The agreement out of which the dispute arose, was in the following terms :—“Agreement made the 23rd day of July, 1885, whereby Josiah John Strickland agrees to sell, and A. H. McCulloch agrees to buy, 2000 2-tooth, 1800 4-tooth, 1100 6-tooth, and 1000 8-tooth ewes, more or less, now lambing, with

1897. their lambs given in, at the price of 15s. each for the ewes.
STRICKLAND The ewes sold are now the ages above stated, and are *those which*
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McCulloch. *were shewn by the seller to Mr. Buchanan on purchaser's behalf,*
and now running on Bundaburra, and to be depastured by the seller in the paddocks in which they are now running, free of cost, until the first day of October next. That after the first day of September next, the ewes may be shorn by the purchaser at his own expense at the Bundaburra woolshed, and the wool consigned to the Commercial Bank by the seller, to be sold by the bank, and the proceeds applied towards the payment for the sheep, and on the first day of October next the seller shall deliver to the purchaser the ewes and lambs, on receiving the balance of the purchase money in cash to the credit of the seller at the Commercial Bank, Sydney."

The evidence of the plaintiff was that in May Buchanan went to see the sheep. That they were then distributed in three paddocks. Lots of 900 and 1100 were in two adjoining paddocks, and 4000 were in another paddock, three or four miles off. Buchanan saw the 900, and examined some of them. He also saw the 1100. Plaintiff asked him if he would like to see the 4000. He asked if those he had seen were a "fair run" of them. Plaintiff said, "Yes." Buchanan then said he would not bother to look at the others. Plaintiff had several communications with Buchanan about the sheep between then and the 23rd July, when the agreement was signed. On the 11th and 12th September Buchanan was on the station, when the sheep were mustered for marking. He said the sheep did not look the same. Plaintiff pointed out that it was because they had lambed; and suggested that another difference was that sheep had fallen in price. They had fallen fully 5s. On the 30th September plaintiff told Buchanan in Forbes that he was ready to give delivery next day. Buchanan then shewed plaintiff a telegram from defendant, dated September 30, to the effect that he (defendant) would take the sheep if the plaintiff would allow him 500l. reduction in price. Plaintiff said he would not depart from the agreement in any way. Before this the plaintiff had received a letter from the defendant, dated September 18th (put in), to the effect that the sheep were described in the agree-

ment of July 23rd as "then lambing;" that defendant was informed by Buchanan that they had not then (September 18th) finished lambing, and proposed terms. Plaintiff replied to this on September 21st (letter produced and put in) to the effect that all the ewes except a few odd ones had finished lambing by the end of August. The letter went on:—"Mr. B. stated at our yards the day we marked the paddock, in the presence of at least three others, 'that the lambing as to time was quite right.' The only paddock he marked, 1430 ewes marked nearly 80 per cent. on the 12th inst. Since that Mr. B. has not been here. I think that is sufficient proof as to the ewes having finished lambing." Plaintiff never heard any complaint from Buchanan or from defendant of the quality of the sheep, except what Buchanan said in the yard at the marking. Plaintiff sold the sheep by auction on the 24th October. Some one bid up to 11s. 6d. on behalf of defendant. Plaintiff bought them in at 11s. 9d. He claimed the difference in price between 11s. 9d. and 15s.; and also 2½ per cent. commission which he had to pay the auctioneer. On the 1st October he offered Buchanan delivery of the sheep. Buchanan said, "I can't take delivery; they are not according to sample." Plaintiff bought the sheep in three lots from Walsh, Chisholm and Caldwell. Cross-examined: He sold 1400 ewes on the 19th May to one Bowler. These were another lot he bought from Walsh. They realised 14s. 3d. Buchanan must have seen them. They were more valuable than those of Walsh's sold to defendant, because they were in lamb earlier. In August he had 1700 ewes on the run besides the lot sold to defendant. They were inferior sheep—middling merinos. Buchanan saw them. They were never mixed with the others.

Thomas Strickland, brother of the plaintiff, said he saw Buchanan on the station on the 19th July. The 5000 sheep were there all in one paddock. The next morning Buchanan rode with witness through the paddock, and saw about 5000 sheep, and said they looked splendid. He said they were a splendid lot of lambs. He left witness and rode through the paddock again. After this 1400 of the sheep were put in the adjoining paddock, where there was better grass. On the 11th September, when Buchanan came, the 1400 were mustered. He said they

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1887. looked well ; and made no objection to them. [Witness then
STRICKLAND corroborated the plaintiff as to what occurred on the following
v. day.] It was difficult to judge sheep accurately after lambing, as
McCULLOCH. compared with their appearance before lambing. There were
about 1½ per cent. of late lambs—nothing unusual in this.
They allowed eight weeks for lambing. It was not true that
half of them were inferior sheep.

Alfred Oakes, brother-in-law of the plaintiff. Lived at Bundaburra ; was away in May ; returned in July ; saw Buchanan there in July and in September. Witness brought the 5900 sheep on the station. The sheep Buchanan saw in September were the same sheep. In July Buchanan told witness he was satisfied with the sheep, and would take them as they were. [He corroborated the evidence of the plaintiff and his brother as to what took place on the 12th September.] Buchanan was there during the whole of the shearing.

George Quinn, a selector on the plaintiff's run, said he knew the 5900 sheep sold to the defendant. He was present when the 1800 were drafted off and put into the other paddock. They were all of good quality. There were only two paddocks. [He corroborated the previous witness as to what took place on the 12th September.] Cross-examined : I saw the sheep arrive on the station 4000 in a mob, and 1800 another paddock. I have had 1000 sheep on my selection, but not at the same time as the sheep sold to the defendant.

Arthur Battye, stock and station agent, residing at Forbes, had these sheep placed in his hands by the plaintiff for sale. After the sheep were on the plaintiff's station, witness went with Buchanan to look at them—on the 19th May. They saw about 1800 or 2000. Buchanan did not handle any of them. 200 or 300 were to be culled out of the 6000. Buchanan said the price asked (16s.) was too high. He said afterwards to witness he had seen all the sheep, and he was perfectly satisfied with them. They were a very good lot, in fine condition. He saw Buchanan again in October. He never heard Buchanan express any dissatisfaction with the sheep till the day after he was to take delivery of them. Witness asked him why he did not take delivery of them. He said : " Never mind ;" and seemed as if he

did not wish to speak about the matter. There was a great fall in the price of sheep from July to October. In October, buyers were scarce. In July, Buchanan told witness he thought the sheep would have a very good lambing: 80 per cent. Cross-examined: Witness had not been paid his commission. Buchanan said to witness in June: "I have seen enough of the sheep; if they are all alike, I will take them."

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William S. Hudson, partner of last witness, remembered plaintiff going to Sydney to sign the contract. Two or three days before that, Buchanan said he would like to have another look at the sheep. He went; and on his return told witness they were a good lot. He said he had seen all the sheep, and there was plenty of grass.

Samuel G. Bowler: Purchased some ewes from plaintiff, in May, and took delivery of them on the 20th July, and sold them. He never saw the whole of the 5900. A flock of sheep took two months to lamb. Sheep fell in price between July and October. Defendant was a large purchaser of sheep at that time. Defendant bought 8500 sheep from witness, and left them on his hands. Cross-examined: If he bought sheep on the 23rd July, as "now lambing," he would expect the lambing to close about the end of September. They ought to be a month old to travel.

James Little proved that on the 28th April he sold the 7600 ewes to the plaintiff. They were in three lots: 1600 by Chisholm, 3500 by Caldwell, and 2500 by Walsh.

Other witnesses were called to prove the difference in the appearance of sheep before and after lambing.

A great number of letters and telegrams were put in evidence, the material parts of which are set out in this report.

Darley, Q.C., moved for a non-suit on the ground that there was no evidence that the sheep in question were ever shown by the plaintiff to Buchanan.

Sir J. Martin, C.J., declined to non-suit, on the ground that there was evidence of statements by Buchanan that he had seen the sheep.

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Defendant's case.

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Edward A. Buchanan said he had had sixteen years' experience managing sheep : was four years managing 11,000 stud sheep in Victoria, and three years overseer on Willandra Station, where there were 30,000 sheep ; had been fourteen months in the defendant's employment ; on the 16th May, after receiving instructions from the defendant, he went to Bundaburra to see the sheep. He went with plaintiff. Saw 500. Plaintiff said there were 800 or 900 in the paddock. Witness caught about fifty of them and examined their wool and points. He was very satisfied with the sheep ; they were a very good lot and heavy fleeced. They also looked at another lot about a mile away—1500. Plaintiff told witness the balance of 4000 were in a paddock six miles out, and asked if he would go out and look at them. Witness replied : " If these sheep are a fair sample of the whole I am satisfied." Plaintiff said there was no difference. Plaintiff said they would begin lambing about the 7th or 8th July. Witness said he should report favourably of them. The price asked was 14s. 6d. to be delivered then. On the 19th May he had occasion to pass through Bundaburra on the way to inspect sheep at Warroo ; he saw more of the plaintiff's sheep then. About the 6th or 8th July he saw the plaintiff at Forbes, and asked him what he would take to give grass till the first October. Plaintiff said 16s. Witness then wrote to defendant, and the price was eventually fixed at 15s. He wrote to defendant in July that he would see about the plaintiff's grass and report. He went out on the 20th ; saw the lambs and the grass ; believed they were the same as he had seen before. He then wrote the letter of the 20th July to the defendant :—

" I have carefully inspected every acre of land at Strickland's, and satisfied myself that the 8000 acres in the two paddocks would carry the sheep safely until end of September. About forty per cent. of lambs have dropped and look well. About 3000 of the ewes are a fortnight later, and just starting to drop. They all look in lamb, and I quite expect to mark 80 per cent. I am positive in my own mind that 70 will be the lowest possible percentage. Mr. Strickland, the manager, has business in Sydney, and said he would like to call personally and sign agreement."

Witness went to Bundaburra next on the 11th September. He continued : " They were mustering the sheep at the yards.

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We postponed the marking till the next day. The next day, the 12th September, the sheep were mustered in the yards by the plaintiff and his men. I went in to the yard to look at the ewes. I assisted to get the lambs into the yards. Immediately I got into the yard I noticed a mob of sheep that I had never seen—a different class of sheep to the sample altogether. I caught a great many, one an old sheep to which I called plaintiff's attention. Five sheep I pulled he said he thought belonged to Bowler; he did not say so positively. I caught another—a decided crossbred; he said: 'Yes, that is one of your sheep.' I told him I did not buy crossbreds. I then caught another sheep—an inferior sheep. I said: 'There is an infernal lot of rubbish among these sheep; they are not within 3*s.* or 4*s.* of the value of those sheep I saw in May.' I kept objecting. I hesitated what to do. Plaintiff after a while said: 'There is a good lambing out there.' I said: 'Oh! It is not the lambing I am complaining of, it is the confounded ewes.' Witness noticed that about 30 of the lambs had only been dropped that night or the day before, and that about 200 others had only been lambed a week before. After some further conversation the lamb-marking was continued. About 700 or 800 of the 1400 were the same as he had seen before. The rest were crossbreds or culls. He got back to Bundaburra on the 21st September and assisted at the shearing. On the 26th he saw the 4000. I went carefully through these sheep, and found they were no better than those I saw on the 12th." Witness then wrote to the defendant on September 26th as follows:—

"I have deferred writing to you *in re* Strickland's ewes and lambs until I had seen all of them, and fully prepared to give you my ideas, &c. When I marked the first lot, 1400 ewes, a fortnight ago, I almost refused to do so, stating to John J. Strickland that the ewes were not equal to the sample handled by me in May last. He stated that the sample I saw were not selected by him, but a fair cut from the mob. However, I told him I was not satisfied and would form my opinion when I saw the rest (4000) in the yard—as yet I have not been able to see them yarded, and they are not marked yet. To-day I went carefully through all the 4000 in the paddock by myself and dog and carefully inspected the ewes—the ewes are not up to the sample I saw, and not nearly as good as I anticipated or as reported by me to you by letter. In May I, in company with John J. Strickland, put together about 500 ewes in a paddock near his house; and I handled about 50 ewes and felt quite satisfied that they were a good lot. I saw no scrubbers amongst them. J. J. S. told me that was a sample of the general run of the ewes—a cut from the mob. . . . The good

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ewes I saw are amongst these ewes, but there is a large percentage of inferior woolled sheep that I never saw in what I first inspected. . . . I believe these ewes to be a real good lot and represented them to you as such—but they are not nearly as good. I cannot say or know whether Strickland put the best ewes by themselves to show intending purchasers, but it certainly seems strange.” [The letter went on to say that the ewes and lambs, though unsatisfactory as a class, looked well and strong, and that the grass was good; and to ask for further instructions as to taking or refusing to take delivery.]

Witness received a telegram in reply to this letter on the 28th September :—

“ Do not take delivery Strickland’s ewes, wait to-day’s letter instructing.”

On the 30th September he discussed with plaintiff the question of a reduction in price in accordance with the terms of a letter received on that day from the defendant; an abatement of 500*l.* was proposed by defendant but refused by plaintiff, who said he should insist on his agreement. Plaintiff afterwards saw witness at Forbes, when plaintiff said :—“ People are saying that I have packed these sheep—I hope you won’t say why you won’t take delivery or anything about the sheep.” Plaintiff also said : “ I wish we could settle this affair; I would rather lose 500*l.* than have such a bother as this.” Witness said : “ Then give me your cheque for 500*l.* and I will take delivery and carry out the agreement.” This, however, plaintiff refused, saying :—“ I am willing to do anything that’s fair after you take delivery of the sheep.” Witness said : “ I must have it in black and white, I can’t take any promises.” Plaintiff then said : “ The only way for it, then, is an action.” The matter then fell through. There was no fall in price between the 23rd July and the 12th September in cases where there was plenty of grass. Cross-examined : On the 16th May he telegraphed to defendant that he had inspected 6000 grand ewes of Strickland Brothers. He also telegraphed on the 23rd July : “ Strickland’s ewes are a real good lot.” In a letter of the 4th June witness spoke of the same ewes that had been inspected by him. On July 20th he satisfied himself as to the grass, and as far as he saw the sheep were good. He did not round up the ewes. He would not go within a hundred yards of them when dropping lambs : it would be improper to do so. He could see the condition, but not the quality of the wool at that distance. He did not examine the

sheep until the 26th September. The sheep he praised to Mr. Locke were Bowler's, not the plaintiff's.

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Henry Manns, drover, was at Bunda burra on September 12th, when Buchanan was examining some of the sheep; heard Buchanan say he had not seen that sort of sheep before; plaintiff said they were the same sheep and they had never been interfered with. There might have been about a third inferior sheep.

The defendant gave evidence of the interview which he had at his office with the plaintiff on July 23rd. Plaintiff said: "My name is Strickland; Mr. Buchanan agreed with me to sell you those ewes at 15s. 6d., I to keep them till September 1." Witness replied: "Mr. Buchanan has no power to make any such arrangement; his duty is limited to inspecting sheep and reporting to me; I would not allow him or any other person to make a contract for me, because if I did I might at any time be ruined." He said Buchanan had approved of the sheep. Witness said if the quality was as represented he would give 15s. if plaintiff would paddock them till October 1. He described them as "now lambing"; and witness pointed out that it was most important that they should not be late lambing. After a long conversation the agreement sued upon was drawn up and signed. Witness: "I believed that before the contract was signed Buchanan had seen all the sheep. He (plaintiff) said the ewes had been shown to Buchanan. He said, 'The ewes are those seen by Buchanan, and which I shewed to him?' That was after I had read the extract from Buchanan's letter."

Several witnesses were also examined as to the meaning of the words "now lambing."

The jury found a verdict for the plaintiff, with damages 978l. 15s.

A rule *nisi*, to enter a nonsuit, or for a new trial, was granted on the following grounds:—1. That his Honour, before whom the cause was tried, should have nonsuited plaintiff, on the ground that it was a condition precedent to the plaintiff's right to recover in the said action that the 5900 ewes mentioned in the contract should have been shewn by the seller to Mr. Buchanan. 2. That his Honour was in error in directing the jury that it

1887. **STRICKLAND** was not necessary that all the sheep mentioned in the contract should have been seen by Buchanan, but that it was quite sufficient if he had seen part. 3. That his Honour should have allowed the following question put by the defendant's counsel to the defendant:—"Would you have entered into the contract unless you had been assured by the plaintiff that Buchanan had seen all the ewes?" 4. That the damages are excessive. [The rule was refused on the ground that the verdict was against evidence.]

Salomons, Q.C., and Rogers in support of the rule. Though leave was not reserved the Court can order a non-suit to be entered. The defendant here did not buy by sample. If the words in the contract had been "approved by B.," we should be out of Court; but our contract was to buy *certain* sheep, viz., those *shewn to and seen by B.* As Lord *Cairns* said in *Bowes v. Shand* (1) at p. 468: "The plaintiff has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to shew that, he cannot claim any damages for the non-fulfilment of the contract."

[SIR G. INNES, J. Suppose Buchanan had seen 5000 of the 5900.]

The same principle would apply. The contract is one and indivisible, and the defendant is entitled to a literal fulfilment of it. It is the contract itself that must be looked at by the Court. As Lord *Hatherley* said in *Bowes v. Shand* (1), at p. 474: "The contract then was for 'rice to be shipped during these two particular months, March and April, or either of them, and *not otherwise.*'" So we are entitled to have the particular sheep shewn to Buchanan and *not otherwise.* There the rice was "to be shipped;" here the sheep were those that "have been shewn;" therefore the present is an *a fortiori* case. Again, Lord *Blackburn*, at p. 480, said:—"The parties have chosen, for reasons best known to themselves, to say: 'We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship;' and before the defendant

(1) L.R. 2 App. Cas. 455, reversing 2 Q.B.D. 112.

can be compelled to take anything in fulfilment of that contract, 1887.
 it must be shewn, not merely that it is equally good, but that it STRICKLAND
 is the same article as they have bargained for—otherwise they v.
 are not bound to take it.” McCULLOCH.

[SIR G. INNES referred to *Reuter v. Sala* (2).]

The representation of the plaintiff that the sheep had been shewn to Buchanan amounted to a condition, and, therefore, the buyer was entitled to repudiate the contract, as in *Bannerman v. White* (3), and *Nichol v. Godts* (4). As to the evidence, admitting that Buchanan had an opportunity of seeing all the sheep, and could have seen them, still, if they were not shewn to him, the defendant is entitled to repudiate the contract. Even if there was evidence to go to the jury that Buchanan could have seen them all, the learned Judge directed the jury that it was not necessary that Buchanan should have seen all the sheep, and the jury did not find expressly that Buchanan did or did not see them. Lastly, as to damages. They were clearly excessive, as the sheep were bought in by the plaintiff at the sale in October at 11s. 9d., and re-sold in February at 15s. No evidence was given as to the loss of grass sustained by the plaintiff, which would have been the proper measure of damages.

C. B. Stephen (Owen, Q.C., with him) shewed cause. The proper measure of damages is the difference in price between the time when the defendant ought to have taken delivery and the time when the sheep were actually sold. On that calculation the jury assessed the damages. Had the plaintiff obtained the contract price from the defendant, he could have bought other sheep, which would have fattened on the grass actually eaten by these sheep. It does not matter at what price the plaintiff re-sold the sheep afterwards in February.

[*Salomons*. If before writ you have got all your money back, what damage have you sustained? If the plaintiff has sustained no loss, he can claim no profit.]

(2) L.R. 4 C.P.D. 239.

(3) 10 C.B.N.S. 844; 31 L.J.C.P. 28.

(4) 10 Exch. 191; 23 L.J. Ex. 314.

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They should have cross-examined as to the value of the grass between October and February. If the defendant had paid the plaintiff, the latter could have made a second profit. As to the main point, the words in the contract were merely words of description and identification. The plaintiff, having shewn that he has substantially complied with the contract on his part, it would be a slur on the administration of justice to allow the defendant to succeed now on this point.

[FAUCETT, J. Not if the case comes within *Bowes v. Shand* (1).]

In that case Lord *Blackburn* says, in the passage quoted in *Benjamin on Sales* (3rd Ed.), p. 572, that the words "constitute a warranty or condition precedent as to the description of the article to be sold." In *Bowes v. Shand*, the breach of contract was that the rice offered did not correspond with the description warranted. Here, the plea of fraud having been withdrawn, there is no question as to the identity of the 5900 sheep; and it was only to identify the sheep that the words came into the contract. Here, we may suppose that the defendant said to the plaintiff: How shall we identify the sheep? and that the plaintiff replied: "The 5900 shewn by me to Mr. Buchanan." It was not necessary that Buchanan should have inspected every individual sheep, as would be necessary in the case put by Mr. *Salomons* of the purchase of twenty pictures by Constable. A better illustration would be a contract for the purchase of 150 tons of old lead, described as shewn by A. to B. on a certain day, or now lying at a certain place and inspected by B. Take the case of a contract for the sale of sheep "inspected by my agent." Would it be necessary to prove that the agent had examined every sheep? To say that the words are more than words of description or identification would lead to absurdity. They merely constitute a "representation" within the decision of *Behn v. Burness* (5). That case shews that a purely descriptive statement such as this is not to be regarded as a warranty or a condition on the failure or non-performance of which the

defendant can repudiate the contract *in toto*; but that it is "a warranty in the narrower sense of the word—viz., a stipulation by way of agreement for the breach of which a compensation must be sought in damages." Suppose in the present case the plaintiff had tried to repudiate his contract on the ground that he had not himself shewn the sheep to Buchanan, could he have succeeded? As to the ground of misdirection, even if this ruling was given (and we say that it was not), the Court will not interfere if the verdict is a just one: *Edmondson v. Machell* (6).

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[*Salomons* referred to *The Prudential Assurance Company v. Edmonds* (7).]

As to the third ground [he was stopped].

[FAUCETT, J. The Court would not allow a new trial on so small a ground as that].

Salomons, in reply. The plaintiff's case in chief was that he had only 5900 sheep on the run on the 16th May, when Buchanan first inspected; therefore, it was contended, those must be the sheep. Then in cross-examination, when he found we knew of the sale to Bowler on the 19th May, he shifted his ground and said he had on the 16th May the 5900, 1400 (sold to Bowler), and 250 culls.

[Owen, Q.C. The rule was refused on the ground that the verdict was against evidence.]

As to the second ground, the rule must go for the reasons stated by Lord Blackburn in *The Prudential Assurance Company v. Edmonds* (7). As to the third ground, our contention is that of the defendants in *Bannerman v. White* (3), "that the contract was an executory contract; that the intention of the parties governs in all contracts whatsoever; that, upon the evidence, it was clear that the stipulation in question was intended by these parties to be a condition." Erle, C.J., delivering the judgment

1887. of the Court, adopted this :—" This undertaking was a preliminary stipulation ; and if it had not been given, the defendants STRICKLAND would not have gone on with the treaty which resulted in the sale." In conclusion, the contract was not complied with, first, McCULLOCH. v. if the sheep were shewn by Thomas Strickland (he not being the seller and not being proved to be agent or partner of the seller) ; secondly, if Buchanan was merely told by the seller that he could go and look at them.

FAUCETT, J. This was a motion for a new trial of an action heard before his Honour the late Chief Justice Sir James *Martin*. A verdict was given for the plaintiff ; and the damages were assessed at 958*l.* 15*s.* In my opinion, there can be no question whatever that upon the evidence that verdict was perfectly right. But we are now called upon to set it aside upon the ground (among others) that his Honour misdirected the jury. The action was brought for not accepting certain sheep sold by the plaintiff to the defendant under an agreement dated the 23rd July, 1885. The material part of that agreement is as follows :—" J. J. Strickland (plaintiff) agrees to sell, and A. H. McCulloch (defendant) agrees to buy, 2000 two-tooth, 1800 four-tooth, 1100 six-tooth, and 1000 eight-tooth ewes, more or less, now lambing, with their lambs given in, at the price of 15*s.* each for the ewes. The ewes sold are now the ages above stated, *and are those which were shewn by the seller to Mr. Buchanan on purchaser's behalf*, and now running on Bundaburra, and to be depastured by the seller in the paddocks in which they are now running free of cost until the first day of October next, &c." On that agreement the declaration was framed. In the fourth plea, on which the verdict turned, the defendant sets out the terms of the agreement, and says (amongst other things) that " the defendant agreed to buy from the plaintiff certain ewes which were then lambing, and which were shewn to a certain Mr. Buchanan on the defendant's behalf, and the defendant says that the ewes which the plaintiff offered to deliver to the defendant, in pursuance of the said agreement, were not those which at the time of the said agreement were then lambing, *and were not those which were shewn to the said Mr. Buchanan on the defendant's behalf.*" It appears

that his Honour told the jury, and I think properly told the jury, that the question to be considered turned mainly upon that plea; and accordingly a verdict was, and, in my opinion, most justly, found for the plaintiff. A rule *nisi* was obtained, and it is necessary to call attention to the grounds on which that rule was granted. It was refused on the ground that the verdict was against evidence; therefore we have nothing to do with that ground. The rule was granted on the grounds, first, that his Honour should have nonsuited the plaintiff on the ground that it was a condition precedent to the plaintiff's right to recover, that the 5900 ewes mentioned in the contract should have been shewn by the seller to Mr. Buchanan; and, secondly, that his Honour was in error in directing the jury that it was not necessary that all the sheep mentioned in the contract should have been seen by Buchanan, but that it was quite sufficient if he had seen part. Then there is a third ground, which I shall consider later on. Now, the case has been argued to a great extent on a ground not taken in this rule, that his Honour was wrong in not directing the jury that the sheep should have been shewn by the plaintiff to Buchanan. This question was absolutely not raised by the rule *nisi*. But if it had been so raised, and if his Honour had so directed the jury, my opinion is that such a direction would have been wrong. If the learned Judge had so misdirected the jury, then, although the verdict was right, it would, according to the case of *The Prudential Assurance Company v. Edmonds* (8), have to be set aside. In that case, we find a remarkable statement of the law as to misdirection. It was laid down by Lord *Blackburn*, with the assent, I believe, of the other members of the House of Lords then present, that "when once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the Judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*." That statement carries the law to the utmost limits. Following that out, it comes to this, that, however right—however clearly

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(8) L.R. 2 App. Cas. 507.

1887. and demonstrably right—a verdict may be ; still, if the Judge has
STRICKLAND misdirected the jury, the verdict must be set aside. That is a state-
v. ment of the law which might be startling to the public, though not
McCULLOCH. to the legal profession. If, however, it were proved to us that his
Faucett J. Honour had told the jury that it was not necessary that the sheep
should have been *all* shewn to Buchanan, my opinion—and, I
believe, that of my learned colleagues also—would be that such
direction was not wrong. But that is not a ground taken in the
rule ; and we are, therefore, relieved from the difficulty of decid-
ing the question.

As to the first ground, it is said that his Honour should have
nonsuited the plaintiff. Now a nonsuit is moved for at the close
of the plaintiff's case, and before any evidence is given for the
defendant. Let us see whether the evidence would justify such
a course. We have carefully considered it, and consulted
together, and are unanimous that it would not. The evidence
shews that on May 19th Buchanan had seen two lots of sheep,
and was told that there were some others in a paddock four
miles away. He was evidently satisfied with those he had seen,
and, though he was told that the others were in another
paddock, he said it was not necessary for him to go and see
them. Whether the telling him they were there, and that he
might go and see them, was equivalent to shewing them to him,
is a question with which I will deal later on. On the 18th July he
met the plaintiff in Forbes, and told him he was going to have
another look at the sheep ; and the plaintiff told him the whole
5900 ewes were in one paddock together. Buchanan said he
would go out and see them the following day. The plaintiff
suggested that he should take two days. The paddock was an
open one of 6000 acres. Accordingly Buchanan went ; and
Thomas Strickland, a brother, and, as I think there is some
evidence to shew, an agent of the plaintiff, rode with him and
pointed them out to him. Though he may not have seen every
single sheep, he had every opportunity of examining them, if he
wished to do so. He was shewn the sheep—all the sheep. Suf-
ficient evidence having been given that the sheep subsequently
tendered to M'Culloch were the same sheep that Buchanan saw in
July, if not in May, there was no ground whatever for a nonsuit.

In my opinion if his Honour had nonsuited, he would have been in error. It seems to me, therefore, that the sheep were shewn to Buchanan; and I am quite willing to adopt the argument of Mr. *Salomons* that it is necessary that the sheep should have been shewn to Buchanan. It is impossible to contend, without putting a strained construction upon the agreement, that there was not a fair and reasonable compliance with the agreement. Therefore I am unable to avoid the conclusion that the nonsuit was properly refused.

The next point contained in the second ground is one of greater difficulty, and upon which I admit I have had considerable hesitation in deciding, so much so that I was at one time in doubt whether we ought not to grant a new trial. But to justify us in granting a new trial on such a ground, the objection to the verdict must be clearly made out. As in the case of a ground that the verdict is against the evidence, it must be shewn that the verdict is wrong; so, when exception is taken to the ruling of a Judge it must be shewn that the ruling was wrong. But it must first of all be shewn that the ruling objected to was given, and that it was objected to. It is true that his Honour the late *Chief Justice* was a member of the Court, before which the rule *nisi* was moved for, and took no exception to the granting of the rule. But there is no note of his Honour, or of the counsel (the present Chief Justice), who moved for the rule, to guide us. All we have is a note by his junior, the late Mr. *Teece*, from which it is most difficult to find out what his Honour's ruling was. If the words are to be taken barely, as they are stated in the rule *nisi*; if, that is to say, his Honour in directing the jury told them "that it was not necessary that all the sheep mentioned in the contract should have been seen by Buchanan, but that it was quite sufficient if he had seen part," I should agree with Mr. *Salomons*, and say that the verdict could not stand in accordance with the statement of the law which I have just read from *The Prudential Assurance Co. v. Edmonds* (8). If the learned Chief Justice directed the jury that it was enough if Buchanan had been shewn part of the sheep, or if he had confined his direction to what occurred in May, I should say he was wrong, and there ought to be a new trial. The note of Mr.

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1887. *Teece*, however, if it shews anything, goes to shew that that STRICKLAND could not have been the case. From that note we find that the learned Judge did distinctly refer to what occurred in July.

Fancett J.

It is a strange thing that throughout the argument of counsel the word "seen" was used instead of "shewn"; but it appears from Mr. *Teece's* note that the learned Judge did use the word "shewn," and that, when he used the words "seen by," they were used in the sense of "shewn to," proving that he had a clear recollection of the words used in the contract. It would be too absurd, and I do not think the learned counsel went so far, to say that it was necessary that Buchanan must have seen every one of the sheep. To refer to Mr. *Teece's* note again, his Honour said:—"There is evidence that these 5900 ewes were on the run on the 19th July." That statement shows that his Honour had in his mind what occurred in July, and that he did not confine his attention to what took place in May. It would, therefore, be dangerous to assume that his Honour's direction only referred to the one occasion in May. Unfortunately, the learned Judge is no longer amongst us to remove the difficulty which I feel, as to whether this ground was taken; and it is for the defendant's counsel to clearly establish that it was. I have here the telegram of the 20th July, in which Buchanan says he has seen Strickland's ewes. He had been there the day before, and had ridden through them with the plaintiff's brother. On the same day, in accordance with what he says in the telegram, he writes:—"I have carefully inspected every acre of land at Strickland's, and satisfied myself that the 8000 acres in the two paddocks would carry the sheep safely until end of September." I do not see how he could have inspected every acre without seeing the sheep as well. The letter goes on:—"About 40 per cent. of lambs have dropped, and look well. About 3000 of the ewes are a fortnight later and just starting to drop. They all look in lamb, and I quite expect to mark 80 per cent. I am positive in my own mind that 70 will be the lowest possible percentage." Here, I may observe, he speaks of two paddocks; of 40 per cent. of lambs; and of 2000 more sheep than he saw in May, which would make up the whole 5900, so that when we compare the two accounts together, it is clear that Buchanan represented to

the defendant that he had seen all the sheep. The letter concludes :—“Mr. Strickland, the manager, has business in Sydney, and said that he would like to call personally and sign agreement.” This letter was written on July 20th, and must have been received by Mr. McCulloch before July 23rd, when this agreement between McCulloch and Strickland was signed. Taking all these things together, neither of these grounds can be sustained.

We now come to the third ground on which the rule was granted, viz.:—“That his Honour should have allowed the following question put by the defendant’s counsel to the defendant :—‘Would you have entered into the contract unless you had been assured by the plaintiff that Buchanan had seen all the ewes?’” It seems to me that this objection is one that cannot be supported for a moment. From the telegram and letter to which I have already alluded, it is clear that Buchanan informed McCulloch of the state of things in July; that Buchanan had seen the sheep; and that he had told McCulloch that he had seen them. If this question had been put to McCulloch, I cannot conceive how he could have said that he would not have entered into the contract if he had not been assured by the plaintiff that Buchanan had seen the sheep. The question was put in reference to the charge of fraud which had been withdrawn. The case of *Bannerman v. White* (9) which was cited, is quite inapplicable, as there was a plea of fraud in that case. Here, the plea of fraud having been withdrawn, the question was not admissible. All the Judge had to do was to construe the contract. The question, whether or not under certain circumstances McCulloch would, or would not, have entered into the contract, is quite immaterial. It could not in any way have assisted, but might possibly have prejudiced the jury.

As to the ground that the damages were excessive, I do not think that the verdict can be set aside on that ground. It appears that the plaintiff sold the sheep by what has been called a mock sale by auction, and bought them in himself. I think that sale was a fair test of the price at the time. The real

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1887. measure of damage is the difference between the contract price
STRICKLAND and the price at which the ewes were sold. As a matter of fact
v. an agent of the defendant was present and took part in the
McCULLOCH. bidding, going to within a few shillings of the price at which the
Faucett J. sheep were bought in. On the whole, I think the measure of
damages taken was the correct one. It appears that the plaintiff
eventually realised a higher price than he would have obtained
under the contract, but the variation of the market must be
taken into account as well as the fact that he had them on his
hands for several months. I am of opinion, therefore, that this
verdict ought not to be disturbed.

SIR GEORGE INNES, J. I am of the same opinion. The rule
was granted on four grounds (his Honour read them). As to
the first ground, granted that it was a condition precedent to
the plaintiff's right to recover, that he had shewn the sheep to
Buchanan, it seems to me that there was abundant evidence to
justify the jury in coming to the conclusion that that condition
precedent was fulfilled. The note of his Honour the late *Chief
Justice*, who presided at the trial, expressly states that he refused
the nonsuit, not on the ground that it was not necessary that the
5900 sheep should have been shewn to Buchanan, but on the
ground that there was evidence of a statement by Buchanan
that he had seen the sheep; and in looking at the evidence it
seems to me that there was abundant evidence to justify the jury
in coming to the conclusion that before the contract was drawn
up the sheep had been shewn to Buchanan by Thomas Strick-
land, who managed the plaintiff's station in his absence, for and
on behalf of the plaintiff, and that therefore they had been
shewn in all reasonable intendment by the vendor to Buchanan,
in accordance with the principle *qui facit per alium facit per se*.
On the 17th July Buchanan met the plaintiff at Forbes, and
told him he was going to Bundaburra to see the sheep. The
plaintiff expressed his willingness that he should go, and told
him where he would find them. He went there, and arrived on
the evening of Sunday. The next morning he rode out with
Thomas Strickland for the express purpose of seeing the sheep;
that is to say, in other words, for the express purpose that

Thomas Strickland should shew them to him. Can there be stronger evidence than the letter from Buchanan to McCulloch that Thomas Strickland did shew him the sheep? Buchanan was the agent or servant of McCulloch for the purpose of seeing the sheep; and McCulloch, being advised that Buchanan had seen them and approved of them, entered into this contract. In my opinion there was no ground for a nonsuit.

As to the second ground, that his Honour was in error in directing the jury that it was not necessary that all the sheep should have been seen by Buchanan, Mr. *Salomons* gave up his original contention. He admitted that this really does not mean, and is not to be read as meaning, that every individual sheep should have been seen. He gave up that contention as untenable. But his argument seems to be based on the ground that his Honour told the jury that it was not necessary for Buchanan to have seen more of the sheep than were seen by him in May. If it had been intended that the second ground was to be taken as implying that his Honour had so told the jury, it would have been easy to have framed the ground accordingly. But unfortunately we have no satisfactory note either by his Honour or by the learned counsel who moved for the rule *nisi*, or by his junior, or by any counsel who held a watching brief, that anything was said to form a basis for such a ground. Under these circumstances we must look at the wording of the ground itself. It is quite consistent with what Mr. *Salomons* says would have been correct and sufficient, namely, that it was not necessary for Buchanan to have seen every individual sheep. Had the learned *Chief Justice* told the jury that it was not necessary for Buchanan to have seen more than those which he saw in May, I think the direction would have been wrong and there would have been a mistrial, and we should have had to send the case down again for a new trial. But that is not the ground taken. For these reasons I think the second ground is untenable.

As to the third ground—in the face of the fact that we have this contract before us, what matters it what influenced the parties in entering into the contract? No fraud or deceit is alleged. We must construe the contract strictly in accordance

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1887. with the case of *Bowes v. Shand* (10), the case relied upon by the
STRICKLAND defendant's counsel. In what better position could the defendant
v. have been in, by the reception of this evidence, than he is in
McCULLOCH. now? We have proof that Mr. McCulloch was told that
Innes J. Buchanan had seen all the ewes. Therefore the question on
which the third ground is based would have been immaterial.
We need not consider whether such evidence would be admis-
sible in other cases or even in this case. The contract in itself,
pure and simple—the contract, the whole contract and nothing
but the contract—is what we have to look at. We have not to
consider the question of reasonableness or unreasonableness.
As was pointed out in *Bowes v. Shand*, by Lord Cairns, L.C., it
is for the Court having the document before us to put the
natural and ordinary construction upon the words of the contract,
and we have simply to look at the contract. Lord Blackburn,
in the same case, at p. 480, says:—"The parties have chosen,
for reasons best known to themselves, to say that we bargain
to take rice shipped in this particular region, at that particular
time, on board that particular ship, and before the defendants
can be compelled to take anything in fulfilment of that contract,
it must be shown not merely that it is equally good, but that
it is the same article as they have bargained for—otherwise they
are not bound to take it." So here the question is what they
have chosen to say.

As to the last ground, that the damages are excessive, it
seems to me that the damages were assessed in the proper
manner. I see no ground for supposing that the sale, at which
the sheep were bought in by the plaintiff, was a "mock" sale.
They had been improperly left on his hands by the defendant.
What was the plaintiff in such circumstances to do? He
was just as much at liberty to buy them in himself as if he
had been a perfect stranger; and the price, 11s. 9d., at
which he bought them, was a fair price. It is said that
because he afterwards sold them for 15s., he ought to have
no damages, because he suffered no loss. But that reasoning
is transparently fallacious, for if the defendant had taken the
sheep on the 1st October, as he agreed to do, the plaintiff could

have bought others with the price, and realised a fresh profit upon the consumption of grass. The plain rule is that the measure of damages is the difference between the contract price and the market price at the time of the breach of the contract. I think, therefore, that the damages were rightly calculated on this basis.

I agree with his Honour that we ought not to send down this case for a new trial, and I quite concur in thinking that the verdict was a right one.

DEFFELL, J. I entirely concur. I only wish to add that the term "mock auction," which has been used during the argument to describe the sale after the breach of the contract, seems to me inappropriate. It would be more fair to call it a "test auction," held in order to arrive at the true measure of damages at the time of the breach.

Rule discharged with costs.

Attorneys for plaintiff : *Cape, Kent, & Gaden.*

[Leave was subsequently granted to the defendant to appeal to the Privy Council.]

In re LEWIS LEVY, ONE, &c., *Ex parte* THE INCORPORATED LAW INSTITUTE OF NEW SOUTH WALES.

1886.
Dec. 17.

Attorney and solicitor—Misconduct—Practice where charge may amount to criminal offence—Reference to Attorney-General—No criminal proceedings taken—Inquiry by Supreme Court—Attorney censured and ordered to pay costs.

1887.
May 13.
August 8.

A firm of tailors, having bought 200 acres of land in a remote mountainous district for 200*l.*, issued circulars, falsely alleging that certain prize-drawings had taken place, and informing each person, to whom they were addressed, that he was the "lucky winner" of a block of the said land, consisting of one-tenth of an acre. The circular continued:—"As deeds for freehold blocks cost in a regular way about 5*l.* 5*s.*, we have made a contract with our solicitor to complete deeds, abstract of title, registration stamp, &c., for the sum of 3*l.* 3*s.*" L. was the solicitor referred to, and in fact agreed to charge, and only received, 1*l.* 4*s.* for each conveyance, &c., of which 1529 had been registered. Upon affidavits setting out the above facts, and alleging that several persons who had

The C.J.
Faucett J.
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Innes J.

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taken those conveyances had been unable to identify their land, a rule was granted, on the application of the Incorporated Law Society, calling upon L. to answer the charges contained in the said affidavits.

Held, that, inasmuch as the charge might amount to an indictable offence, the proper course was to allow the matter to stand over generally in order to see whether criminal proceedings would be instituted by the Attorney-General.

The Attorney-General having declined to prosecute, the matter was again brought before the Court in a subsequent term.

Held (*per Faucett and Innes, JJ.*), that L.'s conduct was highly reprehensible, but not deserving of greater punishment than the severe censure of the Court and payment of costs.

Per the Chief Justice. If L. had been from the first cognisant of and a participator in the fraud, he ought to be removed from the roll. Under all the circumstances of the case, he was of opinion that L. should be suspended from the practice of his profession for six months.

Per Faucett, J. There was nothing wrong in L., as a solicitor, making a contract to do work for a specific sum; as the reasonableness of the contract could be determined on taxation.

Edmunds (on Friday, December 17th, 1886) moved to make absolute a rule *nisi*, drawn up in the following terms:—"Upon reading the affidavit of Joseph Murray White, the affidavit of Henry Maney Makinson, and the affidavit of George Kenyon, and on hearing Mr. *Edmunds*, counsel on behalf of the Law Institute of New South Wales, it is ordered that the abovenamed Lewis Levy do on Friday, the 17th December, answer the matter and charges contained in the above recited affidavits."

From the affidavits, sworn in November, 1886, it appeared that Messrs. R. and A. Kurts (tailors, of George-street, Sydney) purchased from Mrs. Callaghan 200 acres of land at the Kurrajong for the sum of 200*l*. Mr. Lewis Levy prepared the conveyance. With a view to selling this land in 2000 allotments of one-tenth of an acre each, a large number of circulars were sent by post to persons in New South Wales, Victoria, Queensland, and South Australia. The circulars were printed in the following terms:—

572 George-street, Sydney,

March, 1886.

MR. —

DEAR SIR,—We have great pleasure to inform you that in our third grand prize drawing for freehold allotments of land 33 feet frontage by 132 feet deep at Kurrajong, near Richmond, on the Western railway line, your number has been drawn a lucky winner of a block, and it will be necessary for you to take possession of the same at once. As deeds for freehold blocks cost

in a regular way about 5*l.* 5*s.*, we have made a contract with our solicitor to complete deeds, abstract of title, registration, stamp, &c., for the sum of 3*l.* 3*s.*

You are quite at liberty to employ your own solicitors, and in such case we will furnish him with full particulars free of charge; but if you wish us to furnish the deeds complete with a plan of the land through our solicitors, kindly forward the amount above stated without delay.

Congratulating you upon your success,

We remain, dear sir, yours faithfully,

R. & A. KURTS.

Full name and address required for making out deeds.

N.B.—We have made special provision for working men. Those who are unable to pay the 3*l.* 3*s.* for the deeds immediately have the option of paying by instalments of 6*s.* a month for 12 months.

The said land was in a remote position in the Kurrajong Mountains; and several persons, who had taken conveyances from the said R. & A. Kurts, had searched in vain for their respective allotments.

The Incorporated Law Institute of New South Wales, having ascertained the above facts, and that Mr. Lewis Levy, the solicitor who was acting for Messrs. Kurts, only received 1*l.* 4*s.* out of the 3*l.* 3*s.* mentioned in the circular, wrote, through their secretary, Mr. J. B. Murray White, to Mr. Levy, as follows:—

DEAR SIR,—The council of this institute having before them a circular issued by Messrs. Kurts, wherein they state that they have contracted with their solicitor to complete deeds, abstract of title, registration, stamp, &c., of land at Kurrajong, for the sum of three guineas, and having been informed that you are the solicitor with whom they have made the contract, and also that although they have received the sum of 3*l.* 3*s.* they do not pay you the same, but a less sum, be good enough to inform the council if such is the case. If not, what is the nature of your contract with Messrs. Kurts? Otherwise the council will take such proceedings as they think the circumstances may demand."

On the same day the Secretary of the Incorporated Law Institute wrote to Messrs. R. and A. Kurts, requesting to know what was the nature of their contract with Mr. Levy.

On the 25th August Mr. Levy replied as follows:—

DEAR SIR,—Without prejudice. In answer to yours of the 20th instant, I make the following reply: I never authorised the circular sent by Messrs. Kurts, as mentioned by you. My contract with Messrs. Kurts was to do some thousands of deeds for the sum of 1*l.* 4*s.* each, they providing all materials, &c. If your board considers that I have done anything wrong or unprofessional, I should like to have their views.

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On the 13th October Messrs. R. and A. Kurts wrote to the Secretary of the Law Institute as follows :—

DEAR SIR,—In reply to yours of the 20th August and the one of yesterday, we beg to refer you to our solicitor, Mr. L. Levy, 75 Castlereagh-street.

Yours truly,

R. & A. KURTS.

On the 25th October the Secretary of the Law Institute wrote again to Mr. Levy, asking for the information for which Messrs. Kurts had referred him to Mr. Levy.

On the following day Mr. Levy called at the secretary's office and stated that he had no answer to give for Messrs. Kurts, other than the one he had given for himself in the letter of the 25th August.

It also appeared that a search had been made on the 5th August at the office of the Registrar-General, and it had been found that 1238 conveyances of Kurrajong and Gosford lands had been given by the Messrs. R. and A. Kurts to various persons, the said conveyances having been, with some exceptions, placed upon the register by Mr. Lewis Levy. Another search was made on the 10th November, and it was found that 291 similar conveyances had been registered since the 20th August.

In answer to these affidavits, the following affidavit of Mr. Lewis Levy, filed on the 17th December, was read :—“In answer to the first paragraph of J. M. White's affidavit, I did receive the letter of the 20th August last as therein mentioned, and did reply thereto by letter, dated 25th August last, but did not receive any answer to my letter. The contents of my letter to the Law Institute, of the 25th day of August last, are true in substance and in fact. I was not aware that Mrs. Shannon and Mr. Makinson had received the circular mentioned in his affidavit, they being sent without my knowledge or consent. It is true that I acted for Messrs. R. and A. Kurts in the conveyance from Callaghan to them as mentioned in Mr. Makinson's affidavit, and for which conveyance I have been paid. I know nothing of the land or its value, nor do I know anything about the survey, only that when I prepare the deeds I have a surveyor's description of the lot that is to be conveyed to the purchaser furnished to me. It is perfectly true that I have

registered some hundreds of deeds for R. and A. Kurts, as mentioned in the affidavit of George Kenyon. Beyond the fact that I have entered into an agreement with Kurts to draw conveyances under the circumstances disclosed in my letter to the Law Institute of the 25th August last, I know nothing of the land, and I know nothing of any circular issued by Messrs. R. and A. Kurts, but was quite content to draw conveyances for them at the price named, as with a large number of deeds it would pay me well to draw the conveyances at the rate of 1*l.* 4*s.* each. I do not see the purchasers of any allotments, and the only persons I know in this transaction are Messrs. R. and A. Kurts, who pay me for the deeds as they are delivered to them, and I have only received fees from them, and never from any person for whom the conveyance was drawn."

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Heydon, for Levy, submitted that there was no distinct charge to answer. The contract he had entered into with the Messrs. Kurts was one which he might legally make. They, and not the persons who took these conveyances, were Levy's clients. If any fraud had been committed by the Messrs. Kurts, Levy was not personally cognisant of it, and therefore not amenable to punishment: *In re Eyre* (1). [He was not allowed at this stage to argue the case at large.]

Edmunds, in support of the rule, cited *In re Whitehead* (2).

The CHIEF JUSTICE. This is a rule calling upon Mr. Lewis Levy to answer certain charges contained in affidavits of Mr. Murray White, Mr. Makinson, and Mr. Kenyon. The course we propose to adopt is to allow the matter to stand over for the present. The law on the subject appears to me to be this: Where a charge is made against an attorney, which may amount to an indictable offence, the attorney, under such circumstances, is not called upon to answer the charge, but it is left to the proper officers to proceed against him. I find that laid down in several cases, the first of which is *Short v. Pratt* (3), reported as follows:—"Serjeant Pell, upon an affidavit imputing to two attorneys of this Court,

(1) 1 C.B. N.S. 151.

(2) L.R. 28 Ch. Div. 614.

(3) 1 Bing. 102.

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concerned in the above cause, misconduct amounting to a gross case of cheating, conspiracy, and maintenance, moved for a rule calling on them to shew cause why they should not deliver up to the plaintiff's present attorney certain papers, belonging to the plaintiff, explain certain accounts of moneys received by them to the plaintiff's use, and answer the matters contained in the affidavit. But the Court thought that as a charge had been brought forward clearly amounting to an indictable offence, they could not interfere or call on the attorneys to make an affidavit, in which they might be made to criminate themselves; they, therefore, recommended another application, calling only for papers and accounts and refused the rule for which Pell had moved." The next case was, *In the matter of* — *gent., one, &c., and* — *gent. one other, &c.* (4), the report of which is as follows:—"Sir John Campbell, Solicitor-General, on a former day in this term, moved for a rule calling on two attorneys of this Court to shew cause why they should not be struck off the roll on affidavits charging them with professional misconduct in certain pecuniary transactions. [*Denman, C.J.* The facts stated amount to an indictable offence. Is it not more than satisfactory that the case should go to a trial? I have known applications of this kind after conviction upon charges involving professional misconduct; but we should be cautious in putting parties in a situation where, by answering, they might furnish a case against themselves on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged. *Patteson, J.*, referred to *Short v. Pratt* (3).] *The Court*, however, desired the Solicitor-General to see if any precedent could be found of such an application as the present having been granted. He now stated that he had been unable to find any, and the rule was discharged."

Now, I am not by any means satisfied that the charges which are contained in Mr. Makinson's affidavit, and which are based upon the circular which was sent by R. and A. Kurts, do not amount to an indictable offence if they be true. Under these circumstances, I think, without expressing any opinion upon

them at this stage of the proceedings, that the proper course is to let the matter stand over generally in order to see whether any proceedings will be taken upon the facts now before the Court. If no proceedings are taken, then the Law Institute, if they think fit, can bring the matter under the cognisance of the Court again. If any proceedings are taken, it will depend upon the result of those proceedings what course the Court may decide to take.

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FAUCETT, J. I entirely concur with what his Honour has said, and it does not appear to me to be necessary to say anything more. That there are charges which may amount to an indictable offence against R. and A. Kurts, and that the respondent in this case is so connected with them—I am not saying now, illegally so, or that he is guilty of any offence—still that those charges do exist is beyond all doubt, and it might affect the ends of justice if we were to take action in the matter. Under these circumstances, I think the matter should be suspended altogether for the present.

SIR G. INNES, J. In view of the course that the Court have determined to take, it appears to me obviously undesirable to make any observations in addition to those which have fallen from their Honours. I therefore refrain from expressing any opinion, beyond saying that I concur in what has been said.

The papers and facts were submitted to the Attorney-General, who declined to institute criminal proceedings.

On Friday, May 13th, the matter was again called on.

May 13.

Edmunds, for the Law Institute, informed the Court that the Attorney-General had declined to institute criminal proceedings, and had left the matter to the Court to take its own course. He cited *In re Whitehead* (5).

Heydon, for Levy. The affidavits disclose no facts which call for punishment. A severe punishment had already been imposed on Mr. Levy by the delay of five months which have elapsed

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since he filed affidavits, in answer to the charge, when the papers were sent to the Attorney-General with a view to a criminal prosecution. The Attorney-General has declined to file a bill; and I claim that as stronger than an acquittal by a jury.

[The CHIEF JUSTICE. I think there is a case in which it was expressly held, that even after an acquittal the Court could strike a solicitor off the roll.]

There is also a case—*Anonymous Case* (6)—in which even after a conviction for conspiracy the Court refused to strike a person off the roll, where malice on the part of the prosecutor and relator was shown.

[FAUCETT, J. In *Pulling's Law of Attorneys* (3rd Ed.) at p. 163, it is thus laid down:—"The Courts at Westminster would, it seems, invariably order an attorney or solicitor to be struck off the roll *after* a conviction for felony. . . . And the rule would apply to misdemeanours of an aggravated character, e.g., sedition, extortion, conspiracy, &c., but not to offences of slight culpability."]

[The CHIEF JUSTICE. When charges of this kind are brought against a solicitor, is he not bound to exculpate himself?]

Is there anything wrong in contracting to prepare a number of deeds for a smaller sum than the ordinary fee?

[The CHIEF JUSTICE. No. But it was wrong to let people suppose that the legal expenses were 3*l.* 3*s.*, when as a matter of fact Levy only received 1*l.* 4*s.*]

It meant that the whole cost to those who obtained the land would be three guineas. How could it prejudice them where the three guineas went to? Besides, no one has come before the Court to complain. When Levy received the letter from the Incorporated Law Society, he made a full statement of the case, and asked for an intimation of opinion. Receiving no answer to his letter, he continued to prepare these conveyances on the same terms for some months, till the Incorporated Law Society

came before the Court. He has expressed his regret, and promised to be more careful in future.

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August 8.

On August 8th the following judgments were delivered :—

The CHIEF JUSTICE : In this case the Court, then consisting of their Honours Mr. Justice *Faucett* and Mr. Justice *Innes*, granted a rule, on the 12th of last November, calling upon Mr. Lewis Levy to answer the matter and charges contained in the affidavits of Messrs. Makinson and White, solicitors of this Court, and also in the affidavit of Mr. George Kenyon. The matter came on to be heard before the Full Court on the 17th of December, when it appeared to the Court that the matter charged in the affidavits might implicate Mr. Lewis Levy with the Messrs. Kurts in a conspiracy to defraud, and accordingly the Court directed the matter to stand over generally in order that the Attorney-General might take proceedings if he saw fit to do so, or to decline to take such proceedings. On the 15th of May, the matter coming on for argument, Mr. Edmunds, as counsel for the Law Institute, appeared before the Court and informed the Court that the Attorney-General had declined to take any proceedings, and had left the matter to the Court to take its own course. The matter has been fully gone into, and the facts appear to be as follows :—Certain persons of the name of Kurts carry on business as tailors in George-street in this city, and these persons purchased certain portions of land. Amongst other lands they purchased 200 acres from a Mrs. Callaghan for the sum of 200*l.*, which land is stated in Mr. Makinson's affidavit to be in a remote position in the Kurrajong Mountains, and to be of very little real value. Having thus purchased the land, they proceed to cut it up into allotments, each allotment having 33 feet frontage by 132 feet depth, and thus each acre gave 10 allotments. This division would appear to have been on paper only, as Mr. Makinson swears that he is informed and believes that the allotments had never been pegged out on the ground, and that several persons who had taken conveyances of such allotments had gone to the Kurrajong and searched in vain for them—facts which are not denied. The next step is that the

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Messrs. Kurts send round printed circulars in the following terms :—" 572 George-street, Sydney, March, 1886. Dear Sir,— We have great pleasure to inform you that in our third grand prize drawing for freehold allotments of land, 33 feet frontage by 132 feet deep, at Kurrajong, near Richmond, on the Western railway line, your number has been drawn a lucky winner of a block, and it will be necessary for you to take possession of the same at once. As deeds for freehold blocks cost in a regular way about 5*l.* 5*s.*, we have made a contract with our solicitors to complete deeds, abstract of title, registration, &c., for the sum of 3*l.* 3*s.* You are quite at liberty to employ your own solicitor, and in such case we will furnish him with full particulars free of charge ; but if you wish us to furnish the deeds complete, with a plan of the land, through our solicitors, kindly forward the amount above stated without delay. Congratulating you upon your success, we remain, dear sir, yours faithfully, R. & A. KURTS. N.B.— We have made special provision for working men. 'Those who are unable to pay the 3*l.* 3*s.* for the deeds immediately, have the option of paying by instalments of 6*s.* a month for 12 months." Now, this circular represents to the person to whom it is sent that there has been a grand prize drawing, and that such person has become a lucky winner of one of these allotment ; in other words, that such person is entitled to one of these allotments without any payment for the land or for the chance of obtaining it ; but that, as a conveyance from the Messrs. Kurts is necessary to transfer the land to the winners, such conveyance, together with a plan of the land, can be had by forwarding, without delay, the sum of 3*l.* 3*s.*, that being the sum the Messrs. Kurts had contracted to pay their solicitors to complete abstract of title, registration, stamps, &c. This was all fiction ; there was no prize-drawing, and the contract entered into with the solicitor was to pay him 1*l.* 4*s.* for each conveyance, the Messrs. Kurts pocketing the sum of 1*l.* 19*s.* themselves ; in other words, having given 1*l.* per acre for this land, they would clear 19*l.* 10*s.* an acre, less some small expenses. Now it has been said that they were quite entitled to make what profit they could ; that in many instances land had been purchased for a few hundred pounds, which afterwards produced

many thousands. Granted ; but in such cases the increase in price was not brought about by any trick or device, whereas here this great profit has been brought about by a trick and a most cunningly devised scheme to take in the unwary. It occurs to me that if ever there was a case where there was a clear conspiracy between persons to defraud the public, this is just the case. It has been argued that the scheme is so transparent that no person could be taken in ; but what are the facts ? It appears from Mr. Kenyon's affidavit that no less than 1238 conveyances had been registered up to the 5th of August, 1886, and that between the 20th of August and 10th of November Mr. Lewis Levy had registered 291 more, making a total of 1529, which gave a return of 2981*l.* 11*s.* to the Messrs. Kurts (less say 150*l.* for expenses, there being 5*s.* stamp duty on each conveyance), and 1834*l.* 16*s.* to Mr. Lewis Levy, in respect of about 153 acres of land which had cost the Messrs. Kurts 153*l.* It follows, therefore, that there were no less than 1529 dupes. It is also said that none of these have come forward to complain. This may be so. It may be that for the sake of the 3*l.* 3*s.* it was not worth their while to do so, or it may be that many would not care to expose themselves to ridicule by making it public how easily they were deceived ; but that they were deceived is not the less apparent, and that there are numerous persons who are from day to day deceived by the most transparent frauds is every day experience. Take, for instance, the fraud known as the "Confidence Trick," in itself a transparent fraud, one which has been over and over again exposed in Courts of Justice, and yet men are found time after time who fall victims to this fraud, and they will be succeeded by fresh victims to the end of the chapter. I say I think it is much to be deplored that these persons, the Messrs. Kurts, were not prosecuted for what strikes me to have been as gross a case of deception as ever came before a criminal Court ; but let this pass. Mr. Lewis Levy was the Messrs. Kurts' solicitor. He it was who prepared the conveyance from Mrs. Callaghan to them, and who also prepared the conveyance of another 250 acres of land situate near the Mount Tomah-road, in the Kurrajong district, purchased by the Messrs. Kurts for 300*l.*, and he it was who had a contract with the Messrs.

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Kurts to prepare conveyances of these chain allotments for 1l. 4s. each. I have one of the deeds before me. It is a printed form, the consideration money being expressed to be 3l. 3s., thus departing from the circular, which represented the land to be free, whereas now the land it is which costs the 3l. 3s., and it is the conveyance which is free. There is no writing in this deed except the date, the name of the grantee, and the description of the parcel of land conveyed. All the rest is in print, as is also the name Lewis Levy on the endorsement. In Mr. Lewis Levy's affidavit in answer, he takes the course of knowing nothing. He knows nothing of the two circulars mentioned in Mr. Makinson's affidavit; they were sent without his knowledge or consent. He knows nothing of the land or its value; he knows nothing of the survey—I fancy this ceremony was never gone through—and he knows nothing of any of the circulars issued by the Messrs. Kurts. Now, although I find it very difficult to believe these statements, I am willing to give Mr. Lewis Levy the benefit of any doubt, and accordingly, for the purpose of this judgment, I take these statements to be true, otherwise I would at once come to the conclusion that Mr. Lewis Levy was a participator in the conspiracy to defraud to which I have alluded, and he should be dealt with accordingly. But on the 20th of August the following letter was written to Mr. Lewis Levy:—
 “Incorporated Law Institute, 69 Elizabeth-street, Sydney, August 20, 1886. Lewis Levy, Esq. Dear Sir,—The Council of this Institute having before them a circular issued by Messrs. R. and A. Kurts, wherein they state that they have contracted with their solicitors to complete deeds, abstract of title, registration, stamp, &c., of land at Kurrajong, for the sum of 3l. 3s., and having been informed that you are the solicitor with whom they have made the contract, and also that although they have received the sum of 3l. 3s., they do not pay you the same, but a lesser sum, be good enough to inform the Council if such is the case; if not, what is the nature of Messrs. Kurts' contract with you; otherwise the Council will take such proceedings as they think the circumstances may demand. I remain, dear sir, yours faithfully, J. MURRAY WHITE, hon. sec.” After the receipt of that letter, and when the whole of the facts were before Mr.

Lewis Levy, he still goes on and prepares and registers, before the 10th of November following, no less than 291 of these fraudulent conveyances, and although he was then, at any rate, made aware that while the Messrs. Kurts are representing to the public that they have a contract with him by which they pay him 3l. 3s. for each conveyance, and this sum is received ostensibly for such purpose by the Messrs. Kurts, yet this is all false, inasmuch as the contract with him is to pay him 1l. 4s., and thus Messrs. Kurts retain the balance, 1l. 19s., for themselves, and this he sanctions with full knowledge of all the facts. Now, assuming Mr. Lewis Levy to have been entirely innocent of all wrongdoing up to the 20th August, yet Mr. White's letter of that date put him upon enquiry, and he had then all the materials before him for discovering the fraud which was being carried out with his assistance by the Messrs. Kurts; he then knew of the species of partnership in his costs, which then in fact existed between him and the Messrs. Kurts, and the extent to which the latter participated in such costs. Now, under these circumstances, what course should this Court pursue? Is it by abstaining from administering punishment to lend its sanction to such proceedings as are here disclosed, or is it by taking a course showing its condemnation of such conduct as that of Mr. Lewis Levy, to protect the public from frauds which, but for the co-operation of a professional man, could not be successfully carried out? I am of opinion that this Court, looking upon Mr. Lewis Levy's conduct in the most favourable light, and assuming him to be innocent up to the 20th August, yet seeing that after that date, and with the warning he then had he still persisted in carrying on this matter, must mark its sense of such conduct, and inflict punishment upon him. I was at first of opinion that it would be our duty to have directed the removal of Mr. Lewis Levy's name from off the rolls of the Court, and this certainly, so far as my judgment goes, would have been his fate were I satisfied that he was from the first a participator in the frauds. But dating the commencement of his wrongdoing as from the 20th of August, I am of opinion that justice demands that Mr. Lewis Levy be suspended from the practice of his profession for a period of six months. By such an order the

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Court will, in my opinion, at once mark its sense of his conduct, and point out that it is the duty of all such as Mr. Lewis Levy to protect the public in so far as they may be able from fraud, and to carefully abstain from lending themselves in their professional capacity to a fraudulent scheme, no matter how cleverly devised it may be, having gain for its object, at the expense of a too-confiding public. I am the more inclined to take this milder course, thinking that possibly Mr. Lewis Levy, forgetting that the very use of his name as a solicitor of this Court would tend to entrap the public, may have come to the erroneous conclusion, that having entered into a contract to carry out this matter he was in some sense bound to do so, though, of course, no such contract as that stated could, under the circumstances, be binding on anyone; and also taking into consideration that this matter has been for so many months hanging over Mr. Lewis Levy's head, in itself no light punishment. In my opinion, taking all the circumstances of the case into consideration, the suspension of Mr. Lewis Levy from the practice of his profession for the period of six calendar months, and the payment by him of the costs of all proceedings herein, will be a sufficient vindication of justice, and a sufficient punishment for the offence committed.

FAUCETT, J. In this case Mr. Levy, a solicitor of the Court, has been called upon to answer the matter and charges contained in certain affidavits. The matter was brought before the Court, at the instance of the Incorporated Law Institute, on the 12th November last year. It was postponed in order that the Attorney-General might have an opportunity of considering whether upon the facts disclosed in the affidavits he would institute criminal proceedings. The Attorney-General has, and we must suppose properly, declined to do so, and we have now to consider the case. Now I say at once that in my opinion the Law Institute acted properly in bringing this matter before the Court. As at first brought before us, the case presented circumstances that raised a suspicion that Mr. Levy was concerned with Messrs. R. and A. Kurts in a transaction of a discreditable character. (The learned Judge here referred to the facts of the

case.) Whether we consider this sum of 3*l.* 3*s.* as, according to the circular, the fee paid to the solicitor for preparing the conveyance, or according to the deed of conveyance, as the consideration or price given for the land, is really of little consequence. Indeed, according to the circular, the lucky winner gets the land for nothing, and if he chose to employ his own solicitor to prepare the conveyance, the Messrs. Kurts would have got nothing for the land—they would have given it away. This course, no doubt, they calculated would not be adopted. But the substance of the transaction, as it appears to me, is this: A small allotment of land of 33 feet frontage by 132 feet in depth is given away or sold for 3*l.* 3*s.*, that is, taking 10 such allotments to the acre, at the rate of 31*l.* 10*s.* an acre, such acre having cost the Messrs. Kurts 1*l.* The profit thus to the Messrs. Kurts would in any event be very large. But what is the position of the lucky winner or purchaser who accepts the proposal, which he is in no way bound to do? He gets his small allotment for 3*l.* 3*s.* free of all cost of conveyancing. According to the circular, as I have already said, he gets his allotment for nothing, the 3*l.* 3*s.* being the alleged cost of conveyance. But—still according to the circular—if he chose to employ his own solicitor to prepare the conveyance, he was at liberty to do so, and then the land would be a gift or a prize from the Messrs. Kurts, and in such case his solicitor's charge for preparing the conveyance would probably be about 3*l.* 3*s.*, if not more. But, assuming that his own solicitor would charge at the same rate as Mr. Levy did—a very unlikely thing—then the case would stand thus:—Solicitor's charge, 1*l.* 4*s.*; stamps, 5*s.*; paper, &c., say, 1*s.*, all which were paid by the Messrs. Kurts. This would make together 30*s.*, so that the purchaser would thus get the land—apart from the charge for the conveyance—for the sum of 30*s.* That is at the rate of 1*s.* a foot frontage by 132 feet in depth. Now, when we consider how common it is for land speculators and land companies to buy a block of land for a small or moderate price, and to "cut it up" and sell it in small allotments, and at what enormous profits these small allotments are sold—out of all proportion to the original price of the blocks—I am not prepared to say that when the Messrs. Kurts got 3*l.* 3*s.*, or rather in

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reality little more than one-half that sum, for each of these small allotments, they got that sum for what was really worthless. If, under the circumstances, I could come to the conclusion that the land was really worthless, or that the price, considering the size of the allotment, was so exorbitant, as it is said to be, I have no doubt I would agree with his Honour as to the course he thinks ought to be taken. Mr. Makinson says he heard that some persons went to search for their land, and could not find it, as if it were not marked out. But the land was there; and such persons had their remedy against the Messrs. Kurts, but we have had no complaint from them. Besides, according to this circular, they were invited to take possession at once before they got their conveyances. There is another point. I see nothing wrong in Mr. Levy, as a solicitor, making a contract to do work for a specific sum. The matter, however, would still be open to taxation, and if the sum agreed upon were fair and reasonable, the contract would be held good. (See *Re Davidson*, decided in February, 1882.) Lastly, Mr. Levy seems to have taken the real and substantial view of the matter when he mentioned £3 3s. as the consideration in the deed of conveyance, although such a statement is not in accordance with his own contract. That was, as I have said, in reality what the land was given for. Mr. Levy denies all knowledge of the circular until it was brought to his notice by the Law Institute, and I suppose we must take his statement on this point. On the whole, while the transaction was, as I have said, a sale of a small allotment of land, it was accompanied by statements which undoubtedly are discreditable to those who issued the circular, and I am not able to separate Mr. Levy altogether from the transaction, as although he may not have seen or authorised the circular, I cannot see how he could be altogether ignorant of the manner in which the Messrs. Kurts were dealing. I think, therefore, he is deserving the severe censure of the Court, but I doubt that the case is one in which fraud is so clear as to call for the suspension of Mr. Levy for six months; but I think that in order to mark the opinion of the Court, Mr. Levy ought to pay the costs.

SIR G. INNES, J. I concur in thinking Mr. Lewis Levy's conduct highly reprehensible. He has clearly lent himself, sooner

or later, to representations contained in this circular, which are a series of untruths; and to the law, which, notwithstanding some blemishes and defects, is in the main the embodiment of truth and justice—of honesty and righteous dealing—lying lips are an abomination. But that the circular was calculated to defraud I fail to see. I cannot conceive the frame of mind that could be deceived or taken in by the lies in this circular, lies gross as the Kurrajong Mountains, open, palpable. Who, receiving this circular, could be deceived into thinking he had taken a ticket in a lottery? and who in fact could be deceived into thinking the proposition any other than an offer embellished, or more properly disfigured, with several imaginative statements, of a block of land at Kurrajong of 33 feet frontage by 132 feet deep for the sum of 3*l.* 3*s.*? The most voracious *gobe-mouches* could not fail to see the true quality of the morsel he was invited to swallow, the most gullible of dolts could not be pitied if he really were deceived. To such persons the maxim must surely apply: *Qui volunt decipi, decipiantur*, for the simple reason that in such a case as this they are, if deceived at all, deceived by themselves and by no one else. I am not saying these things in excuse of the untruths of the Messrs. Kurts, or of the blamable conduct of Mr. Lewis Levy. I know, of course, that no folly, however egregious, on the part of one who is defrauded is any excuse to the defrauder, as I pointed out in the course of the argument, when Mr. Heydon was urging the transparent character of the untruths put forward in the circular. Where fraud is perpetrated it is, doubtless, aggravated by the fact that its victim is a person of weak intellect. But, with Mr. Justice *Faucett* and with that experienced criminal lawyer, the late Attorney-General, I fail to see any attempt or conspiracy to defraud, and, in my opinion, no one has been defrauded. In my opinion it is an entire misnomer to speak of the 1529 purchasers as “dupes.” If they have bought for three guineas what may not be worth three pence, they have themselves, and only themselves, to thank for it. The whole thing, so far as the vendors are concerned, was purely voluntary—entirely optional. They were at liberty to buy or not as they pleased, and if they wished to buy they were at liberty to employ their own solicitor.

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What Court in the world would set aside any one of these conveyances on the ground that the vendee by fraud had been induced to enter into the contract? Let us suppose that such a suit was instituted. Of what "deception"—of what "fraud"—would the so-called "dupe" complain? This: that he had paid his three guineas on the faith of a representation—not that the land had any special value which it turned out not to possess—not that the land was the vendor's, whereas it turned out not to be his—not that the price was only three guineas, whereas it turned out to be more. Nothing of this sort, or of any other imaginable injury to the purchaser; but, forsooth, a representation that Mr. Lewis Levy, the solicitor for the vendors, was to get the whole three guineas, whereas the fact had turned out to be that Mr. Lewis Levy (poor fellow!) only got 1*l.* 4*s.*, and the vendors got, or "pocketed," 1*l.* 19*s.*! Were it not for the great respect due to the opinion of his Honour the *Chief Justice* I should say the thing is preposterous. As to the profit made by the Messrs. Kurts, I attach no weight to that. A man may buy land to-day for 100*l.* which a week or a month hence he may sell for 20,000*l.*, if he is fortunate enough, and no blame is attributable to him. If by a trick or fraudulent device a person is misled into buying, it is of course a different matter. We are told that some 1500 persons have bought. It is surely a significant fact that not one of all these purchasers comes forward to complain. The amount is small, no doubt, and therefore we could well understand their not venturing upon an equity suit to set aside the sale; but surely one of them might have been found to swear in support of this application, and at no cost whatever to himself, an affidavit that he was deceived. But, as I have already said, no one of these purchasers could truly say that he had been deceived by the statements in the circular. The purchasers knew perfectly well that they had taken no ticket in a lottery of Kurts' land, and that the cost to them for the allotment of land offered would be three pounds and three shillings. They have got the allotment of land that they bought, they have paid only that which they were told they would have to pay, and in my view it is simply absurd to say that they have a right to complain that by an arrangement contrary to that

stated in the circular Mr. Levy did not get the whole of the price. Recognising to the full that it is the duty of the Court to check misconduct on the part of its officers—and perhaps agreeing that for Mr. Levy's misconduct, even in the view which I take of it, suspension for six months might not be too severe a punishment—I yet cannot agree with his Honour the Chief Justice in his view of the character of Mr. Levy's misconduct. As the suspension for six months would be for Mr. Levy's being party to a fraudulent conspiracy, of which I do not think him guilty, I cannot concur in so punishing him; but I rather concur with his Honour Mr. Justice *Faucett*. I think Mr. Lewis Levy should understand that by the unanimous judgment of the Court he is severely censured for grave misconduct, and to further mark our sense of that misconduct, he should pay all the costs of these proceedings.

*Ordered: that Mr. Lewis Levy
be severely censured and pay
the costs of the proceedings.*

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Attorney and solicitor—Misconduct—Inquiry postponed for civil action to be August 5.
brought—Refusal to deliver up deeds—Dishonesty—Struck off roll.

K., a solicitor, being ordered to answer affidavits charging him with refusing to deliver up to a client a certain mortgage deed, swore that no such deed was ever prepared by him. The Court ordered the matter to stand over until this and other questions of fact in dispute should be settled in an action at law at the suit of the client. In the meantime an instrument of mortgage signed by K.'s client, and by K. as attesting witness, having been produced in certain Police Court proceedings, was sent to the Prothonotary, and laid before the Court. K., being called upon for an explanation, merely stated through his counsel that, owing to his business having fallen into neglect through domestic bereavement, he had forgotten all about it.

The C.J.
Faucett J.
and
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Held, that K. must be struck off the roll. Order accordingly.

On April 1st, *Field* appeared in support of a summons in Chambers, calling upon Michael Kerrigan, a solicitor of the Supreme Court, to show cause why he should not deliver up

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certain deeds, the property of Cornelius Gralton, and deliver a statement of accounts.

The affidavit of Cornelius Gralton, sworn in December, 1886, stated that in 1884 he instructed Kerrigan to invest 200*l.* for him ; that Kerrigan informed him that he had lent the said 200*l.* to one Robert Masterton, the repayment of which had been secured by a mortgage of two allotments of land and two cottages situated at West Kempsey, at 12 per cent. interest ; that in August, 1884, Kerrigan informed him that he had been paid 300*l.* which he (Gralton) had lent to one Hanrahan some time previously ; and that, under Gralton's instructions, Kerrigan had lent 150*l.* to one O'Neill, on mortgage of a store (house and lands) near Kempsey ; and the balance of 150*l.* to one McNally, on mortgage of a free selection on Nambuccra River, the interest on both these loans being at the rate of 11 per cent ; that Kerrigan had regularly paid Gralton the interest up to November, 1885 ; that since that time Gralton had received no interest ; and that Kerrigan had refused to deliver up the mortgage deeds to him.

Kerrigan, in an affidavit sworn on the 15th March, 1887, admitted that he had received 200*l.* from Gralton, as stated, and paid it to Masterton in Gralton's presence, "such amount to bear interest at the rate of 12 per cent." The affidavit continued : "At the time of tendering the said amount, I informed Gralton that he had no security, but he insisted upon my giving the amount." He denied that he had ever received 300*l.* from Hanrahan on Gralton's account ; or that he ever lent any money of Gralton's to O'Neill or McNally. He also denied that he paid the interest on these loans, or that Gralton ever asked him for mortgage deeds.

An affidavit of Robert Masterton was also read on behalf of Kerrigan, stating that the 200*l.* had been advanced to him by Kerrigan in Gralton's presence and with his consent, &c., and that he, and not Kerrigan, had always paid Gralton the interest. [There was no mention in the affidavit of any mortgage having been given, or that the money had been lent without security.]

In reply an affidavit of C. Gralton, sworn on the 30th March, 1887, was read. He denied that he was present when the money

was advanced to Masterton. So far from having insisted on lending the money without security, he had in his possession a memorandum in Kerrigan's handwriting to the following effect :

1884, March 28th. Paid to Masterton 200*l*. A mortgage of this date has been given by R. Masterton to C. Gralton to secure above amount. All documents are in my possession.

(Signed) M.K.

As to the loan to Hanrahan, he gave Kerrigan a cheque for 300*l*. on the 15th March, 1883, for that purpose. Some time afterwards, being informed by Hanrahan that he had never received the money, Gralton asked Kerrigan if this was so: Kerrigan replied that Hanrahan had received the money, but he did not wish it publicly known. A few days afterwards Gralton was informed by Kerrigan that Hanrahan had repaid the amount; whereupon he consented to Kerrigan advancing the money to O'Neill and McNally, which was done as stated in his former affidavit. Subsequently he received from Kerrigan the following memorandum :—

McNally and Gralton.—Amount paid on account of Mr. Gralton to Hugh McNally, 150*l*. O'Neill and Gralton.—On account of O'Neill, at security, 150*l*.

As to payment of interest, he had the following memorandum by Kerrigan :—

Mr. C. Gralton, in account with Mr. Kerrigan :

					<i>L.</i>	<i>s.</i>	<i>d.</i>
Sept. 2, 1885.—To interest on money advanced	...	...	...	...	60	0	0
April 7, 1885.—Paid Mr. Gralton	...	...	...	...	30	0	0
" " "	...	...	...	...	10	0	0
Paid Mercantile Company	...	...	...	...	13	5	0
Cheque herewith	...	...	...	...	8	15	0
Total	...	...	...	...	62	0	0

Gralton was also examined. He produced a pocket book of his own, containing the foregoing entries, which were made in his presence by Kerrigan; and on another occasion when he brought his will to Kerrigan, who was his executor, the latter said on receiving it, "I will put it with the other papers belonging to you."

The Judge in Chambers (Sir G. Innes, J.) granted the application with costs, and being of opinion that the affidavits disclosed gross misconduct on the part of Kerrigan, brought the matter before the Full Court, and the Prothonotary was directed

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In the following term, on the 13th May,
Field appeared for Gralton.

May 13.

Salomons, Q.C., and *Ralston*, for Kerrigan. Another affidavit, filed by Kerrigan on the 11th May, was read. It contained an explanation of the various memoranda—saying that they were written there by arrangement with Gralton, so that he might have something to show his wife what had become of the money—repeated the statement that the money had been advanced to Masterton without any security, against his (Kerrigan's) advice; and denied generally the truth of Gralton's statements. Amongst other things, Kerrigan stated that on the 25th April, in company with Mr. E. H. Becke, J.P., he had seen Hanrahan, who denied ever having received any advance from Gralton, but refused to make an affidavit.

[An affidavit by Mr. Becke, stating what took place at the interview of the 25th April, was tendered on behalf of Kerrigan, and objected to; but eventually allowed to be read for what it was worth. The affidavits filed in the former proceedings, and the Judge's notes of Gralton's evidence taken in Chambers, were also read.]

Salomons, Q.C. If the affidavits shew that an indictable offence has been committed the Court must postpone their decision until criminal proceedings have been instituted. If Gralton's statements are true, then there are charges of perjury and of embezzlement against Kerrigan. Besides, Kerrigan wishes to prosecute Gralton for perjury. The Court will therefore let the matter stand over till it is known whether criminal proceedings will be instituted. This course was followed in *Levy's Case* (1). In the course of the argument, which was concluded on May 16th, the following cases were also cited:—*Short v. Pratt* (2), *In re Knight and Hall* (3), *In re* — (4), *Robertson v. Mills* (5), *In re* — (6), *In re A.B. (Olerk)* (7).]

(1) *ante* p. 347.

(2) 1 Bing. 103

(3) 1 Bing. 142

(4) 3 Nev. & P. 389

(5) 1 Dowl. N.S. 773

(6) 5 B. & Ad. 1088

(7) L.R. 11 Prob. Div. 56

The CHIEF JUSTICE (after consultation with the other members of the Court) : We by no means yield our jurisdiction ; but we will postpone our decision in this case in order that Gralton may sue Kerrigan for 300*l.*, the difference between the 500*l.* which he alleges Kerrigan received from him, and the 200*l.* which Kerrigan admits having received. We, therefore, postpone the case till the first motion day of next term.

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[The Court also intimated that if by any possibility Kerrigan should seek to defeat the action by shewing that he had lent the money to O'Neill or McNally, he should be estopped by his affidavits from doing so.]

Accordingly, on July 26th,

July 26.

Field informed the Court that an action had been commenced by Gralton against Kerrigan.

The matter then stood over till August 5, before which day Kerrigan was ordered to file an affidavit in answer to other charges brought against him by a person named Keary.

On August 5th,

August 5.

The CHIEF JUSTICE stated that an instrument of mortgage from Masterton to Gralton, which purported to be given to secure the repayment to Gralton of 200*l.* lent to Masterton, had been laid before the Court by the Prothonotary, to whom it had been sent by the police authorities at Kempsey.

Gralton was then sworn and examined by the Court. He identified his signature to the instrument, and that of Kerrigan as attesting witness. It had been brought to him by one McKinnon, a clerk of Kerrigan's, who offered to give it up for 100*l.* After consulting the police, he obtained possession of it on paying the money by a cheque which he afterwards caused to be dishonoured.

Field appeared for Gralton, who had filed another affidavit setting out the above facts ; other affidavits had been filed on his behalf, the material parts of which are set out in the judgment of the Chief Justice.

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Ralston, for Kerrigan, stated that his client did not wish to give any evidence. The only explanation he had to offer was that Kerrigan's business had fallen into neglect through domestic bereavement, and that he had forgotten all about the transaction.

The CHIEF JUSTICE (after stating the facts set out in the affidavits) : When this matter first came before the Court, we thought the proper course was to allow Gralton to bring an action against Kerrigan, and thus test the matter before a jury, and adjourned the case accordingly. In the meantime, information was given to the Court that in certain Police Court proceedings at Kempsey the instrument of mortgage in question was produced, though how it was produced has not been elicited to-day. It appears that one McKinnon, a clerk of Kerrigan's, went to Gralton's house with the mortgage instrument, and offered it to Gralton for 100*l*. Gralton, acting on certain advice, paid the money, and the instrument is now before us. This instrument, which is an ordinary form under the *Real Property Act*, was signed by Gralton, whose signature was witnessed by Kerrigan. The instrument also purports to be signed by Robert Masterton, as mortgagor; and though it is not proved to have been signed by Masterton, the resemblance between what purports to be his signature on the instrument and his handwriting on his affidavit shows that it probably was. The document purports to be a mortgage security for 200*l*. It has no folio or volume marked upon it by which it could be found in the Registrar-General's Office, and it may be that in a Court of law it would be of very little value, but in a Court of Equity Masterton could be compelled to complete this mortgage by a proper instrument. However, there is the document, and, therefore, when the matter was before Mr. Justice Innes in Chambers, Kerrigan had in his hands a document to which his client was entitled—a complete document, or one to be used for the purpose of completing a mortgage to Gralton. Gralton was entitled to have possession of this document. It is impossible for the Court to suppose that when Kerrigan, who was bound by every interest of his client to know of the existence of that document, and exactly what it was, made the affidavit which he has made in this case, he did not perfectly well know that this document was

then in his possession. That affidavit was made at Kempsey, where Kerrigan carried on business, and where this document also was deposited. An affidavit has also been obtained from Masterton, and that affidavit seems to have been prepared with scrupulous care so as to prevent any criminal proceedings being taken against him (Masterton). Of course if it had been an echo of Kerrigan's affidavit, Kerrigan saying that he obtained no security from Masterton, very possibly proceedings might have been taken against Masterton in another jurisdiction for making a sworn statement that he gave no security, but from first to last he has with scrupulous care avoided stating anything about the mortgage security. He simply states that he got the money from Kerrigan at the request of Gralton. Now the evidence does not stop there. It appears from the affidavits filed to-day, and the statement of Gralton, that he signed the mortgage in Kerrigan's office, and that Kerrigan told him that it was a mortgage from Masterton to secure the sum of 200*l.*, with interest at 12 per cent. per annum. Mr. Dangar has also made an affidavit to the effect that Masterton, being reported to be in pecuniary difficulties, went to Gralton about it. In October, 1885, he also went to Kerrigan's office, when Gralton, in Dangar's presence, asked Kerrigan how he stood with respect to Masterton, and Kerrigan told him he need not trouble himself about his security, as he had security enough in the cottages, and was perfectly safe. So that in October, 1885, Kerrigan perfectly well recollected the transaction in regard to the mortgage of 1884, and now we are asked to believe that when he made his affidavit in March, 1887, he had entirely forgotten it. Well, unfortunately we cannot accept that explanation. Here is a case where a client was entitled to and asked for his securities, which were in the hands of his solicitor, and the client was prepared to pay whatever might be due to him. The solicitor refused to give them up, and an application was made to the Court in the ordinary form to compel him to do so. The solicitor then comes forward and swears that there is no such security, and it turns out now that there is, and that at the very time he denied its existence it was in his own possession. It appears to me, under these circumstances, that the Court has but one duty to discharge. I

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regret, and there is no Judge but must regret, having to punish an officer of the Court, but it is a duty imposed upon the Court for the protection of the public against such persons as Mr. Kerrigan to visit them with punishment when found to be guilty of a breach of trust reposed in them by a client, and a breach of duty as officers of the Court. In my opinion there is but one course to pursue in this case, and that is to strike Mr. Kerrigan's name off the roll of the Court. I would be glad if I could take a more lenient view, and that the Court could hold out any hope, as was the case in another similar matter before the Court recently (8), that we might, after a certain interval, reinstate Mr. Kerrigan's name upon the roll. I would be glad if it was a case in which we could direct suspension only; but I feel, on the evidence before me, that Mr. Kerrigan is a person whose name ought not to be on the roll of the Court, and that he ought not to be put before the public as a person in whose honesty they could safely trust. Mr. Kerrigan has had every opportunity of explaining his conduct, but he has filed no further affidavits, and does not go into the witness-box to-day to offer any explanation. Under these circumstances we have only one duty to perform, and that is to strike his name off the roll of the Court.

FAUCETT, J. I am of the same opinion. I do not wish to weaken what his Honour has said, but I must say that I do not think that Mr. Kerrigan should go forth to the world as a person entrusted by this Court with the responsibilities attaching to one of its officers.

SIR G. INNES, J. I deeply regret to say that I am constrained to agree in the observations that have fallen from his Honour the *Chief Justice*.

The CHIEF JUSTICE. Let Mr. Kerrigan's name be struck off the roll.

*Ordered : That the name of
Michael Kerrigan be struck off
the roll of solicitors of New
South Wales.*

(8) *In re Walker*, ante p. 171.

CASES

DECIDED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN ITS

Common Law Jurisdiction,

DURING THE FOURTH TERM, 1887.

WILSON v. LOMAX.

1887.

Oct. 24.

Contract—Measure of damages—Sale of station—Conditional purchases under mortgage to defendant (vendor) included in sale, but forfeited—Breach of agreement to hand over certificates of conformity—Possessory title.

The C.J.
Fawcett J.
and
Innes J.

The defendant sold to the plaintiffs a station, including certain conditional purchases, the certificates of conformity in respect of which were to be handed over to the plaintiffs at completion or at the end of 12 months. It turned out that one of these conditional purchases was forfeited, and that therefore the defendant could not hand over the certificate. It also appeared that the lands were under mortgage to the defendant. The defendant did not plead; judgment was signed; and the case now came on for assessment of damages.

Held, that the proper measure of damages was the freehold value of the land less the amount per acre which the plaintiffs would have had to pay to convert their title into a freehold.

Held, also, that the plaintiffs got no possessory title in the true sense of the word. A possessory title means a good holding title; but the plaintiffs were liable to be turned out at any moment by the Crown or by a selector.

Held, further, that the Judge was right in not leaving to the jury the consideration of the question that the lands were under mortgage to the defendant, and that the plaintiffs were not entitled to a transfer until the end of three years from January, 1886.

MOTION FOR RULE NISI.

This was an action in which judgment was signed in default of a plea, and the case was set down for assessment of damages, and tried at Darlinghurst before *Stephen, J.*, and a jury of four,
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on the 22nd August last. The plaintiffs had declared upon a contract for the sale of a station, consisting of stock and lands, the latter including some conditional purchases, which they had purchased from the defendant. It was part of the agreement, with reference to these selections, that certificates of conformity with respect to them had been, or would be, obtained within a period of 12 months; and it was admitted that there had been a breach of the contract with respect to one selection of 230 acres, the defendant having failed to get the certificate of conformity, as the selection had been absolutely forfeited. The jury assessed the damages at 540*l.* 10*s.*, and a memorandum was filed to set this verdict aside on the following, among other, grounds:—

1. That his Honour directed the jury that the only measure of damage was the value of the land as freehold at the date of the breach, less 13*s.* an acre payable by the plaintiffs to the Government to make the conditional purchase freehold, and that, in assessing the damages, they were to leave all other considerations out of the question;
2. That his Honour ruled that the improvements were not such as would protect the land from being selected again;
3. That his Honour did not leave to the jury the consideration of the question that the lands were under mortgage to the defendant, and that the plaintiffs were not entitled to a transfer of the said lands from the defendant until the payment of the last of the promissory notes, which would be due at the expiration of three years from January, 1886;
4. That his Honour should have directed the jury that the measure of damage was the difference to the plaintiffs between what they had bought and what they had got, having regard to the fact that they had defendant's possessory title, which the defendant could not get back again, and that they had the use of the lands and improvements until dispossessed by the Crown or purchasers therefrom, having regard also to the probabilities of the plaintiffs being disturbed in their occupation by the Crown, or purchasers from the Crown, and the terms on which the plaintiffs themselves might make a title to the lands.

O'Connor, for the defendant, in support of the rule, confined his arguments to the 3rd and 4th grounds.

The CHIEF JUSTICE. In this case the defendant sold some station property, including certain free selections, to the plaintiffs, and it was among other things agreed that the defendant should hand over to the plaintiffs the certificates of conformity in respect of these conditional purchases, either at completion or at the end of twelve months. It turned out that one of these conditional purchases was forfeited, and the defendant was unable to hand over the certificate. The plaintiffs declared for a breach of the contract to furnish these certificates, and alleged that the land thereby became less valuable, and they were unable to give a good title. The defendant did not plead; judgment was signed; and the case came on for assessment of damages. The jury found for the plaintiffs for 540*l.* 10*s.*, being at the rate of 3*l.* per acre, less 13*s.* per acre, which the plaintiffs would have had to pay if the certificates had been handed over, to convert their title into a freehold. I think his Honour was right in refusing to direct the jury as he was requested by the defendant.

It appears to me that the plaintiffs were entitled to the full freehold value of the land, less the 13*s.* per acre. They got from the defendant no possessory title in the true sense of the word. Possessory title means a good holding title; but the plaintiffs were liable to be turned out at any moment by the Crown or by a selector. I think, therefore, his Honour was right in holding that the true measure of damages was the freehold value of the land.

Another point is taken, that his Honour ought to have left to the consideration of the jury the question that the lands were under mortgage to the defendant, and that the plaintiffs were not entitled to a transfer until the expiration of three years from January, 1886. There, again, I think his Honour was right. There is no principle on which a jury could estimate damages of that kind. How can they measure the probability of the money being paid? I am of opinion, therefore, there should be no rule in this case.

FAUCETT, J. As to the possessory right, I cannot see what value the jury could have put upon it. There was nothing for a

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1887. jury to measure. As to the other, it seems a still more flimsy ground. We have to be told to calculate the doctrine of chances.

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Faucett J.

SIR G. INNES, J. I am entirely of the same opinion. The only thing the jury could take as a guide would be the freehold value of the land. As to the other point, the plaintiffs had a right of action for breach of contract.

Rule refused.

Attorney for defendant : *J. McLaughlin.*

BADGERY v. MURPHY.

Oct. 25. *District Court appeal—Appeal by motion under 44 Vic. No. 30, sec. 1—Note must be taken by Judge—Request of party.*

The C.J.
Faucett J.
and
Innes, J.

At the trial of an action in the District Court, a point of law was raised and argued, and the Judge gave his ruling upon it; but he was not asked to make a note of the point, nor did he in fact make any note of the point.

Held, on appeal by way of motion, under 44 Vic. No. 30, sec. 1, that a rule obtained on affidavit must, in the absence of any note by the Judge, be discharged. But, where a Judge does take a sufficient note, the mere fact that he was not requested to do so is immaterial.

Held, further, that a party who has not complied with the statute so as to enable him to appeal by way of motion, may still appeal by way of special case, the provisions as to which have not been repealed.

DISTRICT COURT APPEAL.

Sly, for the respondent, took the preliminary objection that no note of any question of law, &c., had been made by the Judge at the hearing; and that it was not stated on affidavit that the Judge was requested to make a note; therefore the appellant had no right of appeal by motion under 44 Vic. No. 30, s. 1 (1):

(1) 44 Vic. No. 30, s. 1, which gives a right of appeal by motion to the Supreme Court instead of by special case, continues:—"And at the trial or hearing of any such cause suit or proceeding the Judge at the request of either party shall make a note of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto and of his decision thereon and of his final decision of the cause suit or proceeding and he shall at the expense of either party requiring the same for the purpose of appeal furnish a copy of such note or allow a copy to be taken of the same which copy shall be used and received on such motion and at the hearing of such appeal and the costs thereof shall be in the discretion of the Court."

Bone v. Clancy (2), *Airey v. MacMahon* (3). In *Rhodes v. The Liverpool Commercial Investment Company* (4), where a County Court Judge actually took a note of the evidence, but was not required to make a note of any question of law raised at the trial, or of the evidence relating to it, it was held that the unsuccessful party could not appeal by motion, under 38 & 39 Vic. c. 50, sec. 6 (which is the same as sec. 1 of 44 Vic. No. 30), though he applied for a copy of the Judge's notes immediately after the judgment, and his ground of appeal was that there was no evidence to warrant the decision of the Judge.

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[The CHIEF JUSTICE. The point in that case is that no point of law was taken at the trial.]

Here there is no note by the Judge; and it does not appear that the Judge was requested to take a note at all.

Moriarty, for the appellant, was called upon by the Court. [He read an affidavit made by Mr. *Gale*, the appellant's attorney, to the effect that the point of law was taken at the trial, and argued; and that the Judge ruled upon it against the plaintiff.]

The points of law having been argued, a motion for a nonsuit was submitted to his Honour, who was, therefore, substantially or inferentially requested to take a note of them: *Tinsley v. Cook* (5). There the District Court Judge expressly stated in his judgment: "I was *not asked* to note any of the points of law."

[SIR G. INNES, J. But in that case the Judge did actually make a note, though not asked to do so. What we want is the Judge's note of his ruling. He was bound to take a note if you asked him.]

As it was contended in that case, the request to the Judge to take a note is not a condition precedent to the right of appeal. For that position *Seymour v. Coulson* (6) was cited. In that

(2) 2 N.S.W.L.R. 176.

(5) 2 N.S.W. L.R. 363.

(3) *Ib.* 132.

(6) 5 Q.B.D. 359.

(4) 4 C.P.D. 425.

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case, at p. 364, *Brett*, L.J., says: "I do not think that the request is a condition precedent; the language is not consistent with that construction. Section 6 gives a new form of procedure upon appeal. . . . The enactment is in favour of the party who appeals, and for his benefit and in order that he may appeal under favourable circumstances." So *Cotton*, L.J., at p. 365, says: "Does the section make the request to the Judge to take a note a condition precedent to the right of appeal? In my opinion it does not; it merely renders it obligatory upon the Judge to take a note at the request of either party. The right of appeal is not restricted; it is enough if the point of law appears to have been raised at the trial before the Judge of the County Court; and it is sufficiently raised if the Judge necessarily decided it in order to arrive at a conclusion."

[SIR G. INNES, J. Lord *Coleridge*, C.J., in *Rhodes v. The Liverpool Commercial Investment Company* (7) at p. 428, gives as the reason for requiring the Judge's notes:—"So that there may be on the discussion in the Court above a note upon which the Court may safely act."]

A rule *nisi* may be obtained on the Judge's notes or on an affidavit: *Ewington v. Commissioner for Railways* (8). In *Morgan v. Rees* (9), at p. 516, *Brett*, L.J., says: "I desire also to express my strong opinion that if, under the circumstances, when the matter goes before the Court on appeal from the County Court, they think that without a signed note they can hear the cause upon other materials, I cannot see why the appeal should not be heard."

[SIR G. INNES, J. That case decides that a note by the Judge is necessary, but that the Judge's signature is not necessary.]

But the cases show that where no note of the Judge exists, the Court will lean in favour of an appellant.

THE CHIEF JUSTICE. The Court never likes to shut a door to an appeal; but in this case I am of opinion that the appellant,

(7) 4 C.P.D. 425.

(8) 1 N.S.W. W.N. 153.

(9) 6 Q.B.D. 508.

by not following the requirements of the Act of Parliament, has debarred himself from the right to appeal. It appears from the affidavit of Mr. *Gale*, the plaintiff's attorney, that the point of law was taken, and that his Honour the District Court Judge ruled that point against the plaintiff. But the Judge was not asked to take a note of the point. The terms of the Act are very precise. [His Honour read sec. 1 of 44 Vic. No. 30 (1).] It will be seen that the Judge must make a note, not only of the points of law, but also of the facts in evidence relating thereto. Now, in this case it does not appear that he was asked to take a note; and in point of fact he made no note; so that the Court is called upon to decide the case on an affidavit by the plaintiff, or it may be after hearing conflicting affidavits on either side. Thus the Court may have to determine from these affidavits, first, what the point of law was; secondly, what were the facts in evidence relating thereto; thirdly, what was the Judge's decision thereon; and, fourthly, what was his final decision in the cause. Now that is exactly what this Act was intended to prevent. Under the old mode of appeal by special case, if the parties could not agree, the Judge stated a special case. In the first case cited by Dr. *Sly*, *Rhodes v. The Liverpool Commercial Investment Company* (10), Lord *Coleridge*, C.J., at p. 428, says that the object of the provision is "so that there may be on the discussion in the Court above a note upon which the Court may safely act." *Seymour v. Coulson* (11), without overruling that case, which is not referred to by the Judges, decides that where a Judge has made a note, although he was not asked to take it, the Court having before them the evidence which they want, can hear the appeal. In *Morgan v. Rees* (12), at the beginning of the case the solicitor asked the Judge to take notes, saying that the case was one of very great importance. But no special note having been asked for or taken, the Court held they could not entertain the appeal. *Baggallay*, L.J., at p. 514—"I am of opinion that no sufficient request was made within the statute, and though in fact the Judge did take a note of some portion of the evidence, he tells us he did not take the whole of the evidence, but he

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(10) 4 C.P.D. 425.

(11) 5 Q.B.B. 359.

(12) 6 Q.B.D. 508.

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trusted to his memory for a part, and I think that the note he took was not a note taken under the statute, and one which he was bound to sign when required to do so." In *Seymour v. Coulson* (13), a perfect note was taken, and *Cotton, L.J.*, said, at p. 366: "The view of this Court does not extend to those cases where the question of law does not appear upon the Judge's note; I give no opinion as to such a case as that; it may be necessary there to proceed by special case. Further, I say nothing as to an appeal when it is shown that, by the omission to request that a note may be taken, evidence material to the point of law raised upon the rule has not been given. In the present case it appears that all the material facts have been stated by the Judge." In *Pierpoint v. Cartwright* (14), the Court, affirming the case of *Rhodes v. The Liverpool Commercial Investment Company* (15), held that the request for a note must be made during or immediately at the end of the trial or hearing of the cause; and, therefore, that a request not made until an hour and a half after judgment given was too late.

Under these circumstances, though I regret it, I am of opinion that we cannot hear this appeal; to decide otherwise would open the door to much mischief. The probability is that notes would cease to be taken or asked for, and parties would appeal on affidavits alone.

FAUCETT, J. I have come to the same conclusion, but not without very great doubt and hesitation. The Court is always anxious to extend the right of appeal rather than to curtail it. Every Judge is ready to afford every facility for appeals, even from his own decisions and orders; and to assist this Court in getting rid of small points and small difficulties. The great object of this Court is to facilitate appeals on the part of persons who think a Judge has ruled wrongly against them; and with that object in view it has directed that the Judge shall take a note of the point of law and of the evidence, so that this Court can have a statement of the case upon which they can rely. If the present appellant's contention were allowed, everything would be at large. Even the Privy Council will not allow appeals on

(13) 5 Q.B.D. 359.

(14) 5 C.P.D. 139.

(15) 4 C.P.D. 425.

affidavits of this kind. There must be something more substantial. The object of the section is to give this Court some security that the point was properly raised, and it is perfectly immaterial so long as there is a note of the Judge before the Court, whether that note was made at the express request of the party desiring to appeal or not. The tendency of the decisions cited is all one way.

If a party finds that he has not complied with the statute, he can fall back on the old form of appeal by way of special case, the provisions as to which have not been repealed; though it is very rarely adopted now that so convenient a practice as appeal by way of motion is provided.

SIR G. INNES, J. I also feel considerable regret in sustaining this objection. It is clear that the object of the Legislature in passing this Act was that there should be some note of the Judge showing the point of law to be argued. It seems to me that Lord Coleridge, C.J., in *Rhodes v. The Liverpool Commercial Investment Company* (16), gives a very good reason why a note of the Judge should go before the Court on appeal. It is that the Court should have an authentic record of the point raised. I think it would be very unsatisfactory to allow appeals upon affidavits, which might contradict one another. At the same time I do not think the asking is a necessary condition precedent, if the note is there. In such a case the fact that a Judge was not asked to make a note is wholly immaterial.

Rule discharged without costs.

Attorney for appellants: *Goodfellow*, for *Gale* (Moss Vale).

Attorney for respondents: *Fergusson*, for *Davidson* (Goulburn).

(16) 4 C.P.D. 425.

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commission " and "advance payment" mean the same thing ; and that the defendants can recover these payments if it turns out that the commission has never been earned owing to the non-fulfilment of the contract by the parties to whom the "Atlas" was contracted to be sold. But I have come to the conclusion that there ought to be a new trial, as I think it appears from his own notes that the Judge was wrong.

SIR G. INNES, J. I cannot get rid of the difficulty as to what are "advance commissions." A *bonâ fide* order is defined in the agreement, and must mean a substantial order with a binding contract from some substantial person. I cannot think that "advance commission" refers to the 7½ per cent., but must refer to 7¼ per cent. which remained to be earned. None of that would accrue to him until 16 parts of the "Atlas" were delivered and paid for. But as this interpretation of the contract differs from that of my learned colleagues, my opinion, which is not a strong one, may be said to be overruled. On the main point, that the Judge's construction of the contract was wrong, and that the verdict cannot stand, I entirely concur.

Rule absolute, with costs of first trial to abide the event of the second.

Attorney for defendants (appellants) : *Burcher*.

Attorneys for plaintiff (respondent) : *Laurence & Rich*.

Oct. 27.

FOX v. ASHWIN AND ANOTHER.

The C.J.
Faucett J.
and
Innes J.

Trespass—Judgment set aside for irregularity committed by District Court bailiff—Justification under warrant of execution—Liability of party.

A judgment was summarily signed in the District Court on a summons under s. 1 of 43 Vic. No. 7, and execution issued. The judgment was set aside by the District Court Judge on the ground that a bailiff of the Court, whose duty it was to serve such summons, had made a false affidavit of personal service.

Held, that an action of trespass would not lie, as the party was not liable for the improper act of the bailiff, committed while discharging his duty as a public officer.

DISTRICT COURT APPEAL. TRESPASS.

The defendants (appellants), in June, 1886, sold certain goods to the plaintiff. In September, the defendants, through their

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solicitor, issued a summons to obtain judgment by default, under the *District Courts Act Amendment Act* of 1884 (48 Vic. No. 7), s. 1, in the form given in Schedule A.

This summons was given to the District Court bailiff to serve upon the plaintiff. He gave it to an assistant bailiff, who on the 4th October swore an affidavit of personal service on the plaintiff. On the 18th October the present defendants signed judgment on that affidavit, and a *præcipe* for execution was filed by Shorter, their attorney. On the 20th October execution issued, and the bailiff entered the plaintiff's house. On the same day the plaintiff saw the defendants and assured them that he had never been served with the summons, and tendered them the amount of the debt, together with the costs of the action, less the bailiff's fees. This the defendants refused, and the bailiff remained in for five days, and was then paid out under protest by the plaintiff. On the 24th November, the plaintiff took out a summons before the District Court Judge, calling upon the other side to shew cause why the judgment should not be set aside. Both parties were heard and witnesses examined, and the judgment was set aside, the Judge finding as a fact that the summons had never been served upon the present plaintiff.

This action was then brought for trespass "under false and pretended colours of a writ of execution upon a judgment wrongfully obtained by the defendants against the plaintiff, which judgment was duly set aside by the Court as having been wrongfully obtained."

The defendants pleaded that they, having a judgment then in full force against the plaintiff, sued out a warrant of execution, which was the trespass complained of.

The hearing came on before Judge *Dowling* and a jury of four, who, contrary to the Judge's ruling, found a verdict for the plaintiff, with 10*l.* damages. Judge *Dowling* set aside that verdict and granted a new trial.

An application to the Full Court to remove the case by *certiorari* to the Supreme Court (1) having been refused, the second hearing came on before Judge *Wilkinson* without a jury. He gave a verdict for the plaintiff for 20*l.*

(1) Reported *post* p. 392.

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A rule *nisi* to set aside that verdict and enter judgment for the defendants was granted on two grounds:—1. That an action for trespass will not lie under the circumstances of this case, as the judgment by the defendants against the plaintiff was an existing judgment at the time of the alleged trespasses, and the District Court Judge had no power to set it aside. 2. That an action of trespass will not lie against the present defendants, as the bailiff who swore the affidavit of service of summons on which judgment was signed was not the servant of the defendants, but an officer of the Metropolitan and Hunter District Court, and that on the facts appearing in his Honour's notes, there should have been a verdict entered for the defendants.

Salomons, Q.C. (*Sly* with him), for the defendants (appellants). The defendants are not liable for the mistake or misconduct of the bailiff, committed in the performance of a duty imposed on him by statute. No action will lie for maliciously issuing process, because no malice was proved. Trespass will not lie, because when the alleged trespass was committed, a valid judgment was subsisting: *Huffer v. Allen* (2); *Ducy v. Stevens* (3); *Osborne v. Robison* (4). In *Williams v. Smith* (5), *Willes*, J., at p. 623, says:—"It by no means follows that because a writ or an attachment is set aside, an action for false imprisonment lies against those who procured it to be issued. If that were so, this absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. . . . In order to entitle the party against whom the process issues to maintain an action for any intermediate acts done under it, he must shew that the process has been set aside by reason of some misconduct, or at least some irregularity on the person suing it out." In the same case, *Erle*, C.J., at p. 621, says: "Now, it is agreed upon all hands, that if the proceedings had been set aside for irregularity, for the violation of any rule of practice, *Smith* would have been liable, and that if the attorney be liable, as a general rule, the party employing him would be

(2) L.R. 2 Ex. 15; 36 L.J. Ex. 17.

(4) 2 N.S.W. L.R. 193.

(3) 6 N.S.W. L.R. 100.

(5) 14 C.B.N.S. 616.

liable also." [He also cited *De Medina v. Grove* (6), and *Smith v. Sydney* (7).]

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Nash, for the plaintiff, shewed cause. There are three ways in which a judgment may be wrong: First, it may be a nullity; secondly, for irregularity; thirdly, for error. As to the first ground, if the judgment is a nullity then it does not require to be set aside, but an action for trespass will lie for any proceedings taken under it: *Brooks v. Hodgkinson* (8). A judgment wrong for irregularity requires to be set aside before an action can be brought. It is submitted that this case is one of a judgment bad for irregularity, and that the judgment having been set aside trespass will lie. *Sheeley v. The Professional Life Assurance Co.* (9) shews that non-service is an irregularity, because non-service can be waived, whereas nothing that amounts to a nullity can be waived: *Collett v. Foster* (10); *Jones v. Williams* (11); *Codrington v. Lloyd* (12); *Ex parte Buckley* (13).

[The CHIEF JUSTICE. What is the irregularity in this case? Until set aside, is it not judgment of a competent Court, and cannot the defendants justify under it?]

Yes; but once it is set aside it is as if it had never been: *Barker v. Braham* (14), and *Parsons v. Lloyd* (15). Therefore, on the Judge setting aside this judgment it became as though it had never existed, and the justification for the trespass is gone. This is not a case of error, which is a mistake by a Judge or judicial Bench, and which, I admit, protects any persons acting under it from the consequences of their acts, even though the judgment should be set aside on appeal to another Court. The question here is whether an assistant bailiff of the District Court did or did not commit perjury; and that question has been decided once for all by a Court of competent jurisdiction. There is no case in which any judgment obtained by a miscarriage of justice of that kind is classed as "erroneous." It is said that

(6) 10 Q.B. 172.

(7) L.R. 5 Q.B. 203.

(8) 29 L.J. Ex. 93.

(9) 27 L.J. C.P. 233.

(10) 2 H. & N. 356.

(11) 9 Dowl. 702; 8 M. & W. 349.

(12) 8 A. & E. 449.

(13) 6 S.C.R. 96.

(14) 3 Willes 368.

(15) 3 Willes 391.

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there must be privity between the defendants and the persons who made the mistake. I submit that in the sense in which "privity" is used there is abundant evidence of privity in the present case, although the bailiffs and assistant bailiffs were appointed by the District Court Judges, and it is their duty to serve summonses, it is still optional with the parties whether they serve themselves, by their attorney, or by a bailiff, and they are obliged to pay for the bailiff's services if they employ him; and they thereby constitute him their servant. He is as much their servant as the sheriff's bailiff would be if an execution under a *fi. fa.* were put into a wrong house. If this action be not maintainable, there is a grievous wrong without a remedy. It is not material that the money was due and owing, for the trespass might have occurred, there being no debt at all, for it is clear here that the plaintiff has no claim on the ground of a malicious proceeding. He is, therefore, deprived of all remedy. *Ducy v. Stevens* (16), and *Oshorne v. Robison* (17), are different from the present case, as in these cases the judgment had not been set aside.

The CHIEF JUSTICE. This is an action of trespass which was brought in the District Court under very peculiar circumstances. It appears that the present defendants supplied goods to the present plaintiff, who thereupon became indebted to the defendants in the sum of 6*l.* 4*s.* 1*d.* To recover this sum they took proceedings under the Act 48 Vic. No. 7, by issuing a summons under section 1 of that Act, which enables them to have judgment summarily signed. The present defendants sent that summons to a bailiff, duly appointed under the *District Courts Act*. It was entrusted by him to another man, also a bailiff of the District Court, who has been called the bailiff's bailiff, for service. This man made an affidavit of due service, and no payment being made or notice of intention to defend being given, judgment was entered up by the registrar as against the present plaintiff, and execution issued against him. A bailiff was put in the plaintiff's premises, and remained in possession for some time, and then the present plaintiff paid the

money under protest. Afterwards he applied to Mr. District Court Judge *Wilkinson* to set aside the judgment, which the Judge did on the ground that the service had never been effected. It is not necessary now to give any opinion as to the power of a District Court Judge to set aside a judgment which has been entered up by the registrar of the District Court; and the question has not been argued before us. For the purposes of this case, and of this case only, we assume that the Judge had power to set aside that judgment. Having set aside that judgment, the plaintiff brought the present action of trespass. The hearing came on before Judge *Dowling*, who was of opinion that the action would not lie, but the jury perversely found a verdict for the plaintiff with 10*l.* damages. The learned Judge most properly set aside that verdict and granted a new trial. The case then came before Judge *Wilkinson*, who took a different view of the law. He tried the case without a jury, and gave a verdict for the plaintiff with 20*l.* damages; and I may say in passing that it does seem strange to me, considering that the perverse jury only gave 10*l.*, that the Judge should have given 20*l.*

The second point is the one that has been argued here. [His Honour read the second ground of the rule.] I am of opinion that on that ground this motion must succeed. There are only two cases in which a defendant who has succeeded in setting aside a judgment can bring an action for anything done under that judgment. First, when the plaintiff has maliciously and without reasonable and probable cause set the law in motion, when an action on the case lies; the second is where a judgment has been set aside for some irregularity committed with the privy or by some act of the party or his attorney. But in this case the irregularity was not brought about by the party or the attorney, or with their privy. Though the irregularity was not occasioned by the act of the Court, as in *Smith v. Sydney* (18), still it was occasioned by the act of an officer of the Court—for the bailiff was an officer of the Court—and, therefore, the parties themselves are not liable to an action. In *Smith v. Sydney*, *Lush, J.*, puts the distinction in a very few

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(18) L.E. 5 Q.B. 207.

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The law is also clearly laid down in *Williams v. Smith* (19), which case shews that even where a judgment is set aside for irregularity, an action will not lie unless the party who entered up that judgment was at the time of the trespass a wrongdoer. In this case it turns out that in fact there was no service of the summons, but that was not the fault of the parties or their attorney, but the fault of the bailiff. The parties were not at any stage of this case wrongdoers. It was the bailiff who was the wrongdoer, and it is against him only that an action is maintainable. The present defendants never misconducted themselves in any way, or committed any irregularity in the proceedings. I think Judge *Wilkinson*, even assuming he had power to set aside the judgment entered up under the 48 Vic. No. 7, was wrong, and that the verdict ought to be set aside, and the judgment entered for the defendants.

FAUCETT, J. I am of the same opinion. The question to be determined is, was this irregularity brought about by the present defendants, or their attorney, and unless it was this action will not lie. In this case the facts are very clear. The judgment was obtained in regular form. Everything was done in due compliance with the Act as far as the plaintiffs and their attorney were concerned. It turns out afterwards that an irregularity was committed by a bailiff. No doubt the plaintiffs, or their attorney, might be liable if this improper act of the bailiff had been done by him as their servant. But here the bailiff had certain duties to perform as a public functionary, and

it was in the discharge of one of those duties that he committed the act of irregularity complained of. The plaintiffs and their attorney were entitled to suppose that, as a public official, he would do his duty properly. That is an inference of law. The question then arises whether this misconduct of the bailiff was committed with the privity of the plaintiffs or their attorney. The present defendants had neither the knowledge, nor the means of knowledge, of any such irregularity having been committed. They could not know that the bailiff would commit perjury. As far as they knew everything was regular. They cannot be held liable for the acts of a public officer.

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SIR G. INNES, J. We assume for the purposes of this case, and only for these purposes, that the Judge had power to set aside this judgment. Whether he had or not is a question on which we express no opinion at present, as the matter stands for argument in another case.

The question here is whether, that judgment having been set aside, it exposes the party to an action for trespass. I agree with their Honours in thinking that it does not. In *Williams v. Smith* (20), there is a clear exposition of the law by *Williams, J.* This case was followed in *Smith v. Sydney* (21), where the argument of *Brown, Q.C.*, a very eminent counsel, seems to me so accurate as to draw exactly the distinction between irregularity and error, which exists in this case, which *Mr. Nash* has so zealously tried to get rid of. The old case of *Phillips v. Biron* (22), shews that it is "a matter of privity of the plaintiff and his attorney. . . . In the case of error, it is no fault of the party, but of the Court, and the judgment binds until reversed."

In *Codrington v. Lloyd* (23), the act of the attorney was quite as much the act of the client himself as the act of the attorney as attorney. That is not the case here. The act of the bailiff was one for which neither the defendants nor their attorney were responsible. As *Patteson, J.*, pointed out in that case, at p. 458, "the process when set aside is as if it had never existed; and if the party, therefore, cannot justify under it, neither can the

(20) 14 C.B. N.S. at p. 622.

(22) 1 Str. 509.

(21) L.R. 5 Q.B. 208.

(23) 8 A. & E. 449.

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attorney." A judgment binds until it is reversed. The facts of the present case bring it within *Williams v. Smith* (24). Here the affidavit of service has been regarded by the Judge as an improper and false affidavit. But the judgment was regularly signed as far as the plaintiffs or their attorney were concerned; it has been set aside, not for any irregularity or any act of bad faith on the part of the parties themselves, or their attorney, or any person for whose actions they are responsible, but for an irregularity on the part of an officer of the Court, a paid bailiff. I agree with their Honours in thinking that the rule should be made absolute.

*Rule absolute to enter the verdict
for the defendants, all the costs
of all the proceedings below and
of this motion to be paid by the
plaintiff.*

Attorney for defendants (appellants): *W. T. A. Shorter.*

Attorney for plaintiff (respondent): *Shepherd.*

August 5.

[FOX v. ASHWIN AND ANOTHER (1).]

The C.J.
Innes J.
and
Stephen, J.

*Certiorari—Removal of cause from District Court—Difference of opinion of
District Court Judges—Balance of convenience—Expense.*

The Court will not remove by *certiorari* from the Metropolitan District Court to the Supreme Court, a cause, properly triable in the District Court, merely because the two Metropolitan District Court Judges differ in opinion as to the point of law involved.

MOTION on behalf of the defendants to make absolute a rule *nisi* (a) calling upon the plaintiff, the District Court Judge, and the registrar to shew cause why a writ of *certiorari* should not issue to remove an action of trespass from the Metropolitan and Hunter District Court into the Supreme Court, upon the grounds appearing in an affidavit of one of the defendants.

The affidavit of John Falconer, one of the defendants, and of W. T. Shorter, the defendants' attorney, shewed the following

(24) 14 C.B. N.S. 596.

(1) Decided last term.

(a) On the 20th May, the Court refused an *ex parte* application to grant a writ of *certiorari* in the first instance; but allowed the application to be turned into a motion for a rule *nisi*.

facts :—Service of plaint and summons issued out of the District Court in an action of trespass on 14th December, 1886. The action was tried on the 31st March, 1887, before Judge *Dowling* and a jury of four, when his Honour directed the jury to find a verdict for the defendants, on the ground that they were not liable in law for the trespass complained of. The jury, however, could not agree to a verdict in accordance with his Honour's direction ; and, the verdict of a majority being taken by consent, found for the plaintiff with 10*l.* 10*s.* damages. Judge *Dowling* set aside the verdict, stayed execution, granted a new trial, and reserved the question of costs. The case being set down again for trial in the District Court, an application was made to Judge *Wilkinson*, by the plaintiff's counsel, to advance the case in the list, and fix a day for trial, but his Honour refused to do this, suggesting that, as there could only be a matter of law involved, it should be sent to the Supreme Court at once, a course to which the defendants' attorney assented, but to which plaintiff's counsel would not agree. The affidavit further stated that "there was a great conflict of opinion between Judge *Dowling* and Judge *Wilkinson*, regarding the law in this case, the question of law being 'whether the Judge lawfully had the power or jurisdiction to set aside the judgment in question in this case, and whether an action will lie against the defendants by the plaintiff for the alleged trespasses and conversion by the defendants, the facts, as were admitted by the plaintiff's counsel at the hearing of the cause, shewing that such regular judgment was obtained, and execution issued thereon in good faith, and without malice, which said judgment was allowed to stand, and the execution issued to be enforced, and no proceedings taken to stay or set aside the same for a period of 37 days after the signing thereof.' "

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It also appeared from an affidavit of a clerk of the plaintiff's attorney that when the question of transferring the cause to the Supreme Court arose, Judge *Wilkinson* said that as far as the law was concerned he should direct a verdict for the plaintiff.

Wise (Attorney-General), and *Butterworth*, for the defendants in support of a rule for a writ of *certiorari*.

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Nash, for the plaintiff, shewed cause.

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THE CHIEF JUSTICE. I think this rule should be discharged, as this is not a proper case to be tried in the Supreme Court. It may be unfortunate that the District Court Judges should disagree in their view of the law on this point. I do not think it is necessary for us to apply our minds to the question of law which may arise. The question for us is whether it is a proper case to try here. The *Attorney-General* says the balance of convenience is in favour of a trial in the Supreme Court. I confess I do not see that. As Mr. *Nash* has pointed out, a Supreme Court Judge would probably refuse to certify for costs. It will probably be determined more speedily and more cheaply by an appeal. The parties would not be satisfied with the ruling of a Judge at *nisi prius*, and that would involve a rule for a new trial by way of appeal from the decision at *nisi prius*. I think that the matter can be determined more cheaply and more conveniently in the District Court. I am of opinion, therefore, that this rule should be discharged, and, as there is no good ground for the motion, with costs.

SIR G. INNES, J. I entirely agree. I think it is very much to be discouraged that we should be compelled to listen to remarks alleged to have been made by the learned Judges of the Courts below, remarks which are mere fugitive observations made altogether *obiter*. It is not fair to those learned Judges to bring those observations before us. I cannot see why the case should not be tried in the District Court. Either party who is dissatisfied can appeal. In that way the decision of this Court will be obtained much more cheaply and conveniently; and the parties would avoid the costly and dilatory proceedings which the course suggested would involve.

STEPHEN, J. I am of the same opinion.

Rule discharged with costs.

Attorney for defendants (applicants): *W. T. Shorter*.

Attorney for plaintiff (respondent): *Shepherd.*]

IN RE KING, EX PARTE THE INCORPORATED LAW INSTITUTE
OF NEW SOUTH WALES.

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The C.J.
Faucett J.
and
Innes J.

Attorneys Act (11 Vic. No. 33), s. 13—Unauthorised person drawing a conveyance—Contempt of Court—Punishment.

K. was called upon to shew cause why he should not be deemed guilty of and punished for contempt of Court, "for that he, not being a barrister, attorney, or solicitor, &c. . . . did, in expectation of fee, gain, or reward, and in violation of the Act 11 Vic. No. 33, draw or prepare a certain conveyance relating to certain real estate." It appeared that K., an auctioneer's clerk, had, for a fee of 30s., prepared a conveyance, the formal parts of which were printed, of certain land sold at auction by his employers to one B., who afterwards being about to sell the land, found that the conveyance was imperfect and did not disclose a good title. K. filed an affidavit admitting that he had been guilty of contempt, and expressing his regret for having in ignorance infringed the Act; and stating that the land in question belonged to his mother, and that he had the forms printed for his own private use in his own family transactions.

Held, that K. must pay a fine of 10*l.*, and also a sum of 10*l.* towards the costs of the Law Institute.

MOTION to make absolute a rule *nisi* calling upon John Francis King "to shew cause why he should not be deemed guilty of contempt of the Supreme Court and be punished accordingly, for that he not being a barrister, attorney, or solicitor of the said Supreme Court, or a certificated conveyancer, or a person solely employed to engross any deed or instrument, or other proceeding not drawn or prepared by himself and for his own account, and not being a public officer drawing or preparing official instruments applicable to his office and in the course of his duty, *did, in expectation of fee, gain, or reward*, and in violation of the Act 11 Vic. No. 33, *draw or prepare a certain conveyance* or instrument in writing relating to certain real estate in the said colony, as appears from the affidavits annexed hereto; and why he should not pay to the said Incorporated Law Institute of New South Wales the costs of and incidental to this motion."

The affidavits on which the rule was granted were in substance as follows:—1. The affidavit of Zachary C. Barry, journalist, of Sydney. On the 23rd of April, 1883, Mr. Barry attended a sale by Messrs. Hardie and Gorman of the Roberts' Estate subdivision situated at Bondi, and became the purchaser of two lots, and paid the deposit to John Francis King, a clerk

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LAW
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in the employment of Messrs. Hardie and Gorman. A short time after the sale he attended at Messrs. Hardie and Gorman's rooms and asked King about the title deeds, as he desired to pay the balance of the purchase money forthwith and obtain his title to the land. King replied that he could prepare a conveyance for an amount which Barry believed was 30s. King also said that lawyers would charge him (Barry) several guineas, and added that, of course Barry could employ his own lawyer if he pleased. Barry then said to him, "I suppose you may as well do it; it will be all right," and King then told him that he could have an abstract of title from a stationer at any time. Subsequently King delivered to Barry the conveyance in regard to the land, Barry having previously paid him the sum agreed upon for the preparation of the conveyance. Some time afterwards he placed the land in the hands of an agent for sale, but when a purchaser was obtained the latter objected to the title. Barry then took legal advice, and was informed that the document purporting to be a conveyance, on the face of it did not disclose a perfect title in the vendor, and it was not under seal, and there was a gap of a great many years in the documents disclosing the title. 2. The affidavit of J. B. Murray White, hon. secretary of the Incorporated Law Institute of New South Wales, that he had obtained a certificate from the Prothonotary, setting out that John Francis King was neither a barrister nor attorney of the Supreme Court, nor a certificated conveyancer under the Act 11 Vic. No. 33. 3. The affidavit of J. G. Cannon, clerk to Mr. J. B. Murray White, stating that he had searched in the Deeds Registry and found a copy of deed in question registered by another clerk of Messrs. Hardie and Gorman, who had also paid the stamp duty on it.

An affidavit was filed by the respondent in which he stated:—"I have never been informed by the said Institute or any person, and I did not know at the time I prepared the conveyance that I was acting in contravention of the Statute 11 Vic. No. 33, nor contrary to law, and I now express my regret for having in ignorance infringed the Act, and I undertake not to do so again. Out of the sum received by me from Zachary Collis Barry, I defrayed the stamp duty on the conveyance and registration fee.

I acted in this transaction with Zachary Collis Barry solely upon my own account and responsibility, and the firm of Hardie and Gorman was not connected with or interested in the matter, directly or indirectly, in any manner whatsoever, nor was the said firm aware of the transaction as far as I know and believe. My mother is the person in whom the legal estate in the land known as Roberts' Estate subdivision was vested. The printed forms, a copy of which is before the Court, were obtained by me with the intention of making use of them when required only in connection with such same transactions as I or members of my family with others might be privately concerned in as vendors. The title to other allotments of the estate has been accepted by 11 solicitors, who acted for different purchasers, and as far as I know and believe, the title to the estate is in order. As far as I recollect and believe, I affixed an adhesive seal to the conveyance to the said Zachary Collis Barry, and I can only account for the absence of any seal at the present time by the fact that the same has possibly come off."

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Salomons, Q.C. (Browning with him), for the Incorporated Law Institute, in support of the rule, referred to s. 13 of the *Attorneys Costs Act* (11 Vic. No. 33) (1). He submitted that this was a case for substantial punishment, not only in the interests of the public, but also to protect members of the legal profession, who were only admitted to practice after a long and expensive training, and were amenable to the summary jurisdiction of the Court if they were themselves guilty of malpractice. It was in the interest of the public that persons over whom the

(1) 11 Vic. No. 33, s. 13:—"Every person who shall for and in expectation of any fee, gain, or reward directly or indirectly draw or prepare any conveyance or other deed or instrument in writing relating to any real estate or any proceeding in law or equity (other than and except barristers or attorneys and solicitors of the Supreme Court or certificated conveyancers . . . and other than and except persons solely employed to engross any deed, &c. . . and other than and except public officers drawing or preparing official instruments applicable to their respective offices and in the course of their duty) shall be deemed guilty of a contempt of the Supreme Court, and shall and may be punished accordingly for every such offence upon the application of any person complaining thereof, or shall for every such offence forfeit and pay the sum of 20*l.*, to be sued for and recovered in a summary way before two or more justices of the peace, &c."

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Court had no control should be prevented from usurping functions which the law had placed under the direct supervision of the Court. There was no trace of any seal upon this document, and it was clear that Mr. Barry had suffered serious loss by not having obtained a good title to the property which he had purchased. The case of *Ex parte Simpson* (2), which would be relied upon by the other side, would not be a guide to the Court in this case. There the Court only inflicted a nominal fine because the principal part of the offence had been committed in connection with District Court proceedings over which the District Court Judge had jurisdiction.

G. B. Simpson, Q.C. (J. L. Campbell with him), for the respondent. Mr. King had admitted that he was guilty of contempt and expressed his regret, and undertaken not to offend again. Therefore the Court would deal leniently with him. The Act being passed for the protection of the public, and not of the legal profession, the Court would not make him pay the costs of the Law Institute, but inflict a nominal fine, without costs, as was done in *Ex parte Simpson* (2). It was a very harsh course for the Incorporated Law Institute to pursue to bring this matter before the Supreme Court, when it was one that ought to have been dealt with in the Police Court.

Salomons, Q.C., in reply. It would have been a much harsher proceeding to have prosecuted Mr. King in the Police Court. The Act, though passed chiefly for the protection of the public, was also intended to protect the legal profession from any invasion of their rights by untrained and irresponsible persons.

The CHIEF JUSTICE. I think the Law Institute, far from being open to the animadversions which have been passed upon them, have done nothing more than their duty in bringing the matter before the Court, and I trust they will as far as possible take care that the public are protected, not only from unqualified persons and unskilled persons usurping the functions of attorneys, but also in cases where attorneys act improperly in carrying out the interests entrusted to them. I think the Institute is a most

valuable body, and it is to be commended for bringing this matter before the Court. They might have taken a very much harsher proceeding by bringing the respondent before the Police Court, and in that case the only penalty the Court could have imposed would have been 20*l*. There is no doubt that the 13th section of the *Attorneys Act* was passed not for the protection of attorneys, but for the protection of the public. It is to protect the public against unskilled persons preparing documents which require great skill in their preparation. This case is an illustration of the danger of unskilled persons attempting to do that which requires skill. Here is a deed which certainly appears to me, as far as I can judge, never to have been sealed at all. Mr. King states that his impression is that there was some seal attached to it, and that it has fallen off. That may be so; but looking at the document I should say that it has not been sealed, and in addition to that there are two chasms in the title which would have been discovered if a solicitor had been employed. Under these circumstances I think it is the duty of the Court to protect the public, not so much by punishing the respondent, who I am willing to believe has acted in ignorance of the Act of Parliament, but as a warning to other persons that they cannot attempt such duties as these unless they have had the necessary education and skill to enable them to discharge those duties. Mr. King admits that he has been guilty of contempt of Court. For that I think he must be ordered to pay a fine of 10*l*., and also a sum of 10*l*., towards the costs of the Law Institute. That will be a significant warning to other persons in the position of Mr. King that if they attempt to discharge these duties, they cannot do so unless they come within the provisions of the Act, or do the work without fee or reward.

FAUCETT, J. I am of the same opinion. If Mr. Barry desires a remedy he must take another course against Mr. King.

SIR G. INNES, J. I concur in thinking that Mr. King has committed a breach of s. 13 of 11 Vic. No. 33, and exposed himself to punishment. I think the punishment proposed to be inflicted will be quite enough to meet the case, and to deter other persons from doing similar things. I think there was

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strong evidence that this document was under seal, and that the seal, an adhesive one, not uncommonly used, must have come off. The attestation clause shews that it was "signed sealed and delivered;" and it was treated as a deed at the Stamp Office. As to Mr. Barry's title, the Court is not in a position to pronounce an opinion. We do not know what the conditions of sale were.

Order accordingly.

Attorney for Incorporated Law Institute: *Murray White.*

Attorneys for respondent: *Dibbs & Gibson.*

Nov. 1.

Ex parte CRIBB.

The C.J.
Innes J.
and
Stephen J.

By-law—Construction—Public Vehicles Regulation Act (36 Vic. No. 14), ss. 15, 16
—Metropolitan Transit Commissioners' By-laws—By-law 28—Cab standing
longer than necessary for taking up or setting down passengers—Cabman engaged
by the day not plying for hire.

A cabman, who is engaged by the day, and is waiting for his fare, cannot be prosecuted under by-law 28 of the Metropolitan Transit Commissioners by-laws for "permitting his cab to stand, &c.," in the street; as he is not plying for hire.

Quære, whether a cabman may, though engaged, be charged with causing an obstruction in the street under the same by-law.

PROHIBITION.

The applicant, Henry Cribb, was convicted by Mr. W. Johnson, S.M., and fined 5*s.* and 5*s.* costs upon an information laid by Inspector Oram, charging him that on the 27th of August, he being the driver of a licensed cab plying for hire in Pitt-street, "did stand the said cab for longer than was absolutely necessary for taking up or setting down passengers, the said place not being an appointed stand, contrary to the 28th clause of the by-laws of the Board of Metropolitan Transit Commissioners (1)."

(1) By-law 28—"No driver shall, except whilst standing on an appointed stand, permit his vehicle, with or without a horse or horses, to stand in any part of the city longer than may be absolutely necessary for loading or unloading, or for taking up or setting down passengers, nor shall he cause any obstruction in any part of the city or police district of Sydney."

It was admitted on behalf of the defendant that he had stood opposite Tattersall's from 10 a.m. until 12.40 p.m. on the day mentioned in the information.

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For the prosecution it was proved on this day there were races at Randwick, and that the defendant's cab, with about 30 or 40 others, caused an obstruction to the traffic in Pitt-street, and admitted that the cabs left Tattersall's before 1 o'clock, each taking a fare. It was not proved that the defendant brought a fare.

The defendant's case was that he was engaged by the day by a bookmaker named Hart; according to orders, he went to Tattersall's at 10 a.m. Hart told him to wait, as he might want him to drive him round town. He waited till 12.40 and then drove Hart to Randwick, where he remained till the end of the races, and then drove him back. When Hart was in town, he (Cribb) could not take another fare. This was corroborated by Hart.

The magistrate fined the defendant 5s., with 5s. costs, levy and distress, or 24 hours' gaol.

A rule *nisi* for a statutory prohibition was granted on the following grounds:—1. That, as Cribb was employed by the day, the case did not come within the meaning of the 28th clause of the by-laws of the Metropolitan Board of Transit Commissioners, because Cribb was bound to wait for his employer as directed by him. 2. That if the by-law was intended to apply to cases of the kind complained of it was *ultra vires*. 3. That the magistrate was wrong in deciding that the case came within the meaning of the 28th clause, and that the by-law was not *ultra vires*.

Heydon, in support of the rule. First, a cabman who is engaged and is waiting for his fare does not come within this by-law. By-law 52 contemplates this very thing by providing a scale of fares for waiting. If the words "when not engaged" are imported into the by-law after the word "stand," the difficulty is gone. Secondly, if the magistrate's construction of the by-law is correct, the by-law itself is *ultra vires*; ss. 15 & 16 of the Act 36 Vic. No. 14, the *Public Vehicles Regulation Act*,

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show that these by-laws must refer to vehicles "plying for hire."

Thirdly—It is unreasonable: *Heap v. The Barnley Union* (2); *Johnson v. The Mayor of Croydon* (3). Lastly, this construction of the by-law would cause great public inconvenience.

The CHIEF JUSTICE. I am of opinion that the stipendiary magistrate has placed a wrong construction upon this by-law. The by-law itself no doubt was intended for a certain useful purpose, and, properly construed, is neither *ultra vires* nor unreasonable, but it does not apply to the case brought before the magistrate. The appellant was charged with having kept his cab longer than was absolutely necessary to take up and put down passengers, at a place which was not an appointed cab-stand. He was not charged, as he might have been, with obstructing a street of the city, which is a separate and distinct offence, under the same by-law. It appears that he was engaged by the day by a Mr. Hart, and could take no other fare; and that on this particular day Hart had told him to wait. During the whole of the time that the appellant was waiting for Hart he was engaged just as much as if any person engaged a cab, and ordered the cabman to wait outside a shop while the fare went in to make a purchase, or as much as if a person engaged a cab in order to pay a visit, and ordered the cabman to wait. The line cannot be drawn at 30 or 40 minutes or two hours, and so long as the cabman was not plying for hire or obstructing the street, he did not, under the circumstances as stated, come within the meaning of by-law 28. That by-law is in the following terms:—"No driver shall, except while standing on an appointed stand, permit his vehicle with or without a horse or horses to stand in any part of the city longer than may be absolutely necessary for loading or unloading, or for taking up or setting down passengers, nor shall he cause any obstruction in any part of the city or police district of Sydney." That must mean standing while plying for hire, or it may mean standing while not engaged. It is clear from by-law 52 that where a cabman is engaged, and is ordered to wait for his fare, he is bound to do so, and the remuneration he is to receive for waiting is paid

(2) 12 Q.B.D. 617.

(3) 16 Q.B.D. 708.

under that by-law. I think, therefore, that the magistrate's decision was wrong, and the prohibition must be granted.

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SIR G. INNES and STEPHEN, JJ., concurred.

Rule absolute without costs.

Attorneys for appellant: *Slattery & Heydon.*

THE QUEEN v. HALL (THE YOUNGER).

Oct. 28.

Criminal law—Jury—Incomplete panel—Objection to, must be taken before trial—Judge's power to discharge jurors of his own motion for physical incapacity—Jury Act (11 Vic. No. 20), s. 39—Criminal Law Act (46 Vic. No. 17), s. 422—Cattle stealing—Evidence of recent possession—Killing with intent to steal—46 Vic. No. 17, ss. 73, 367.

The C.J.
Faulstich J.
and
Innes J

Before the filing of the information on which the prisoner was convicted, the Judge released from further attendance for the day 12 jurors who had been impanelled in a case of felony on Saturday morning, and were discharged on Monday morning at 10 o'clock. The cards bearing their names were not put in the box from which the names of the jury were drawn. No objection was taken at the time, but after the verdict the Judge was requested to reserve the point that under the circumstances there had been a mis-trial.

Held, that the Judge had power to discharge the twelve jurors as he did *ex mero motu*, without waiting for them to claim exemption, under s. 39 of 11 Vic. No. 20.

Held, also (*Innes, J., dubitante*), that the point was not one which could be raised under s. 422 of 46 Vic. No. 17, that it ought to have been raised when the prisoner was called upon to plead; and was therefore taken too late.

A steer, proved to have been stolen, was found in the prisoner's possession, roped in a yard and admittedly killed by the prisoner. It was contended that, in the absence of direct proof that the prisoner stole the animal, he could only be found guilty of killing with intent to steal under ss. 73 and 367 of 46 Vic. No. 17.

Held, that there was evidence of recent possession to justify a verdict of stealing.

CROWN CASE RESERVED.

The following case was stated by *Stephen, J.*: "The prisoner, Edward Hall, and his brother, Philip Hall, were jointly charged before me at the Tamworth Circuit Court, on the 3rd instant, with stealing a steer, the property of George Wilkinson. Philip Hall was discharged by my direction. At the close of the

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evidence, under 367 (a) of the *Criminal Law Amendment Act*, I left it to the jury to say whether the prisoner Edward Hall was guilty of stealing the animal, or of killing with intent, &c., within section 73 (b). The jury found the prisoner guilty of stealing, and at the request of the prisoner's counsel I reserved the following points:—1. Whether there was any evidence to justify the said verdict. 2. Whether there had been, under the circumstances hereinunder stated, a mis-trial. Before the information in the case had been filed I released from further attendance for the day the 12 jurors who had been impanelled in a case of felony at about 12 on Saturday, and were discharged on Monday morning at 10 o'clock. The cards bearing their names were consequently not put in the box from which the names of the jury were drawn. No objection was taken at the time, but after the verdict I was requested to reserve the point above-mentioned. The question for the Court is, whether the prisoner is entitled to his discharge on either of the above grounds."

The information contained two counts—1. For stealing a steer. 2. For receiving the same knowing it to have been stolen.

For the prosecution it was proved that one Wilkinson, a mail contractor, had three steers running on the town common; that he missed one corresponding to the beast found in the possession of, and killed by the prisoner, Edward Hall. It was branded G over Ξ on the rump, near the tail. He said the hide produced was the hide of the steer he had lost. A piece of the hide had been cut off. He could make out part of the G of his brand;

(a) 46 Vic. No. 17, s. 367:—"Where, on the trial of a person for the offence of killing cattle, within the meaning of the seventy-third section of this Act, it appears that he is not guilty thereof, but is guilty of stealing the animal, the jury may find him guilty of such last-mentioned offence, and he shall be liable to punishment accordingly."

(b) 46 Vic. No. 17, s. 73:—"Whoever steals any cattle shall be liable to penal servitude for ten years. And whosoever wilfully kills any cattle, with intent to steal the carcass, or skin, or other part of the cattle so killed, shall be liable to the same punishment as if he had been convicted of stealing the animal."

the rest of it had been cut off. It was also proved that another brand, H over O, had been put on recently—according to some witnesses, after the beast was killed, as the skin was not blistered inside. It was also proved that the hide produced was sent by William Hall, a brother of the prisoner, to one Piper, a soap manufacturer, who sent it to Smith, a tanner. Police-Sergeant Oldfield, of Moree, arrested the prisoner, Edward Hall, 200 miles away. When he asked him his name the prisoner said, “Find out.” He then said, “I killed the bullock at the old people’s place; it was branded H over O.” He also said he had been to a selection, and that he had killed the bullock by the old people’s orders. Callow, senior constable at Moonbie, who arrested Philip Hall, admitted that the Halls had a lot of cattle; but they were a mixed lot of poor cattle. He never saw one of them fat enough for the hide in question to come off.

For the defence, it was proved that about the 22nd July, Edward Hall, junior, was at his father’s selection at Moree Creek. There were cattle in the yard when the prisoner killed and skinned the beast branded H over O. Annie Kennedy, sister-in-law of the prisoner, living with her mother at Moree Creek, said that her mother gave her two cows and two calves; that she sold a beast 18 months old to Edward Hall, senior, answering to the description of the beast killed by the prisoner.

The Crown called in reply Patrick Kennedy, the father of Annie Kennedy, who said that she had no cattle. Mrs. Kennedy had some, but had never given her daughter any. He was not living with his wife.

The jury found the prisoner, Edward Hall, guilty of stealing.

Rogers (Gordon with him), for the prisoner. As to the first point, though the jury found the prisoner guilty of stealing, they might, under s. 367, have found him guilty of killing with intent to steal. *R. v. Fogg* (1) shews that the killing of a beast cannot be evidence of his having stolen it. As to the second point,

(1) 3 S.C.R. 215.

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a Judge cannot deprive a prisoner of the privilege of being tried by a jury taken from a full panel: 11 Vic. No. 20, s. 39 (c).

[The CHIEF JUSTICE. Was not this point taken too late?]

No; it is a question of law arising on the trial, and it may be taken at any time before sentence: 46 Vic. No. 17, s. 422 (d). *Goodchap v. Nixon* (2) shews that after a trial is over the cards containing the names of the jurors must be returned to the box before another jury is drawn.

[The CHIEF JUSTICE. The cases *R. v. Sheppard* (3) and *R. v. Sutton* (4) are cited in *Archbold* (19th ed.), at p. 170, to shew that "No cause of challenge to the jury, whether to the array or to the polls, can be taken, either in arrest of judgment or otherwise, after the jury are sworn."]

The incapacity of the jurors excused must be made to appear, i.e., by their own statements on oath; the Judge cannot of his own motion exercise his discretion in excusing them. [He also referred to ss. 12 and 23 of 11 Vic. No. 20.]

Harris, for the Crown, was not called upon.

(c) 11 Vic. No. 20, s. 39:—"And be it enacted that if, upon calling over the names upon any jury panel returned as hereinbefore required, any person appearing thereon shall fail to attend, or after appearance shall wilfully withdraw himself from the presence of the above-mentioned Courts, it shall be lawful for such Courts respectively at their discretion summarily to impose any fine not exceeding 20*l.* upon the party so failing to attend or withdrawing himself, unless good cause for such defaulter's absence be made to appear on oath to the satisfaction of the said Courts respectively. Provided always that it shall be lawful at any time for the said Courts respectively to exempt from attendance, either during the session or for any

less period, any person summoned as a juror, who may to such Courts respectively shew on oath sufficient grounds for such exemption."

(d) 46 Vic. No. 17, s. 422:—"Where any question of law arises on the trial of any person, or is submitted, before sentence passed on him, the Court shall, on the application of his counsel or attorney then made—and may in its discretion, without any application—reserve every such question for the consideration of the Judges of the Supreme Court . . . and the like proceedings may be taken, so far as they are applicable, where any question of law arises on the arraignment of any person, or as to the verdict or judgment given or to be given thereon."

(2) 2 S.C.R. 182.

(3) 1 Leach 101.

(4) 8 B. & C. 417.

The CHIEF JUSTICE. The information in this case contained two counts: the first for stealing a steer; the second for receiving the same, knowing it to have been stolen. As to the first point, I am of opinion there was abundant evidence to justify the jury in arriving at a verdict of guilty. The prisoner was in possession of the beast, which was found roped in a yard and killed.

I do not see what better evidence there could be of possession. The evidence shews that the beast had been stolen; if it was not stolen by the prisoner he had to give an account of it. The evidence of recent possession was sufficient to justify the jury in finding the prisoner guilty.

As to the second point, there is some difficulty. There were 48 jurors on the panel. This case did not come on until after the Judge had discharged 12 of them under the following circumstances. On Saturday 12 were empanelled to try a case of felony and locked up till Monday, when they were brought into Court at 10 o'clock in the morning. The learned Judge, knowing that they had been confined for 46 hours, out of consideration for their previous labours, and being of opinion that they were not by reason of fatigue in a proper state to undertake fresh duties, discharged them. I am of opinion that he had the power to do so, under s. 39 of the *Juries Act*, 11 Vic. No. 20. But if the decision of the Judge in exempting a juror had been wrong, it would be ground for challenging the panel. If the panel was too small, the prisoner had a right to ask for a larger panel. The point, however, was taken too late. It is not "a question of law arising on the trial," or "on the arraignment" under s. 422 of 46 Vic. No. 17 (*d*). These jurors were discharged before the information was filed. The prisoner ought when called upon to plead, to have taken objection to the panel. It was not a ground for challenging the array or the poll; as the gist of the objection was that the 12 were improperly discharged. If the point had been taken at the proper time the Judge could have ordered a separate panel to be summoned. Therefore, I am of opinion, first, that the Judge had power to do what he did; secondly, that the point was taken too late. The cases *R. v. Sheppard* (5)

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and *R. v. Sutton* (6), to which I have already referred, apply in principle. I think, therefore, the conviction must be sustained.

FAUCETT, J. I am of the same opinion. As to the second point, the objection ought to have been taken before the trial commenced, therefore it was taken too late. Secondly, the objection itself is of no weight. The Judge had judicial knowledge of the state of the 12 jurors; and if they had respectively shewn on oath the same grounds for exemption, the Judge would have been clearly entitled to discharge them under s. 39 of 11 Vic. No. 20. That section applies as between Judge and jurors. But under the circumstances why was it necessary for them to go through that ceremony? I think the Judge had power to discharge them as he did; and I think in so holding we are only putting a reasonable construction upon the Act of Parliament.

SIR G. INNES, J. I concur in thinking that neither of these grounds is a good one. But I am not prepared to say that the second point was not properly taken under s. 422.

As to the second point, when a Judge has excused a juror on the ground that he is incapable of performing his functions properly, it seems absurd to say that such a course could be held fatal to the administration of justice. It was the practice of Sir Alfred Stephen, C.J., to accept medical certificates, when genuine, in excuse for the non-attendance of jurors. As to s. 39 of 11 Vic. No. 20, it clearly applies only as between the Court and the jury. It gives the Judge a right when a juror *claims* exemption, to put him on his oath to shew sufficient grounds for such exemption. If, however, a Judge is judicially cognisant that such grounds exist, he may discharge a juror on his own mere motion in his judicial discretion. If authority is necessary for this, it is to be found in *Mansel v. The Queen* (7), which is cited in *Archbold's Cr. Prac.* (19th Ed.) 170 in support of the following note:—"It may be observed that there may be cases in which the Court, without challenge taken, may and ought to

(6) 8 B. & C. 147.

(7) 8 E. & B. 54; Dears. & B. 375; 27 L.J. M.C. 4.

excuse a juryman on the panel when called, if he is obviously unfit to perform his duty from physical or mental infirmity."

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Conviction sustained.

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Attorney for prisoner: *Tribe* (Tamworth) by *Ourtiss & Barry*.

Innes J.

Ex parte BOGAN.

July 29.
Dec. 16.

Licensing Acts—45 Vic. No. 14, s. 25—46 Vic. No. 24, s. 8—Packet licenses—Magistrates wrong in law without deciding facts—Prohibition.

Packet licenses are not restricted to sea-going vessels, and under such licenses liquor may be sold on board of any vessel navigating inland waters other than a harbour.

The C.J.
Innes J.
and
Stephen J.

The magistrates having given a wrong decision on a question of law, without deciding the facts, the Court set aside the conviction.

THE information alleged that James Bogan, being then the holder of a packet license, granted under the *Licensing Acts* of 1882 and 1883, for the steam packet "Minnie Walmsley," trading between Gosford and Mullet Creek and Peat's Ferry in the district of Brisbane Water, whilst the vessel was plying within harbour of Broken Bay between Mullet Creek and Peat's Ferry, did sell certain spirituous liquors, to wit, brandy and whiskey, contrary to the Act, &c.

The sections on which this information was based, were s. 25 of 45 Vic. No. 14 (1), and s. 8 of 46 Vic. No. 24 (2).

(1) 45 Vic. No. 14, s. 25:—"Packet licenses may be in the form of the third schedule hereto, and in accordance with the classification hereinafter prescribed, and shall authorise the master of the vessel therein named to sell and dispose of liquor to any passenger on board such vessel during any voyage or passage, but not until such vessel has left her berth or moorings and has proceeded on her voyage or passage; nor shall any such license be available on board of any vessel plying between places within the harbour of Port Jackson. Provided that nothing in this Act contained shall extend to prevent any allowance of liquor being served out to the crew of any vessel, by order of the master thereof, whenever such allowance is not forbidden by any customs or other law in

force for the time being."

(2) *Amending Act* 46 Vic. No. 24, s. 8:—"Any sale of liquor made by the master of a vessel who holds a packet license, or by any of the officers or crew of such vessel with such master's privity or consent, while such vessel is at any wharf, anchorage, or moorings, or while such vessel is plying between places within any harbour of the colony, shall subject the master, officer, or member of the crew selling such liquor to a penalty not exceeding five pounds for the first, and not exceeding ten pounds for the second or any subsequent offence. And every sale of liquor on board such vessel under the circumstances aforesaid shall be deemed to be a sale by the master until the contrary be proved."

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At the hearing before the Licensing Court, the defendant, having admitted that he had sold liquor at the place mentioned in the information, set up as a defence that Mullet Creek was not within the harbour of Broken Bay.

The magistrates gave the following decision :—"The Bench consider that there is some undesirable obscurity about the use of the word 'harbour' in the Acts, but they are of opinion that this section was intended by the Legislature to restrict packet licenses to sea-going vessels. The Bench will, however, decide the case before them by a conviction and a nominal fine, so that (setting all technicalities aside) this case may be treated as a test case, and their decision be either affirmed or reversed by the Supreme Court."

The defendant was accordingly convicted and fined one shilling.

A rule *nisi* for a statutory prohibition was granted on the ground that Mullet Creek, the place at which the sale of liquor took place, is not within any harbour of the colony of New South Wales.

July 29.

On July 29th,

Heydon, for the defendant (appellant), in support of the rule.

No one appeared to shew cause.

The COURT (the CHIEF JUSTICE, SIR G. INNES and STEPHEN, JJ.) reserved judgment.

Dec. 16.

On December 16th the judgment of the Court was delivered by

The CHIEF JUSTICE. This was an application for a prohibition to restrain certain Justices from enforcing a decision by which they inflicted a nominal fine upon the applicant, who was charged with selling liquor on board a small vessel plying within the harbour of Broken Bay. It appears that the applicant was the holder of a packet license issued to him under the provisions of the 45th Vic. No. 14, section 25, as the master of a small steam vessel trading between Peat's Ferry, Mullet Creek, and Gosford. By the 8th section of the 46 Vic. No. 24, any sale of liquor made by the master of a vessel holding a packet license while such vessel

is at any wharf, anchorage, or moorings, or while such vessel is plying between places within any harbour of the colony, subjects the master to the penalty mentioned in the Act. The charge here was that the applicant, being the holder of a packet license, sold liquor while the vessel was plying between places within the harbour of Broken Bay. For the prosecution, evidence was adduced that where the sale took place was within the harbour of Broken Bay, while for the defence evidence was given that where the sale took place was not within that harbour, and that in fact neither Peat's Ferry, Mullet Creek, nor Gosford were within that harbour. The question raised was therefore one of fact, depending for its solution upon the evidence adduced; and we fail to see that the Justices have decided this matter of fact. On the contrary, they have dealt with the case as raising a question of law upon the construction of the Act, and what they really determined, or assume to have determined, was that it was intended by the Legislature to restrict packet licenses to sea-going vessels, and accordingly convicted the applicant, inasmuch as the vessel of which he was master was not a sea-going vessel, but one used for plying in inland waters. We are of opinion that whatever the Legislature may have intended to do, the Act does not restrict packet licenses to sea-going vessels, and that under such license liquor may be sold on board of any vessel navigating inland waters other than a harbour. We think, therefore, the Justices came to a wrong determination on the question of law which they took upon themselves to decide; and as they have not decided upon the facts, this conviction cannot be upheld. The conviction is, therefore, set aside, but without costs.

1887.

Ex parte
BOGAN.

The C.J.

Rule absolute.

Attorneys for the defendant: *Fitzhardinge, Son, & Houston.*

1887.

Ex parte AH HING.

July 27. Justices—Search warrant—*Games and Wagers Act* (14 Vic. No. 9), s. 1—No fresh
Dec. 16. summons or information—Prohibition.

The C. J. A defendant, having been arrested on a search warrant, under the *Games and*
Innes J. *Wagers Act* (14 Vic. No. 9) and allowed bail, appeared on the day mentioned in
and the recognisance, and an objection taken on his behalf, that a fresh information
Stephen J. and summons should have been served on the defendant having been over-
ruled, the case proceeded and the defendant was convicted and fined.

Held, on motion for a prohibition, that as the information, warrant, arrest, charge, and conviction were under the same Act, a fresh information was not necessary. *Blake v. Beech* (L.R. 2 Ex. D. 335) distinguished.

Held, also, that the charge was sufficiently stated in the information to ground search warrant, which was read at the hearing; and that it was manifest under the circumstances that the defendant must have been called upon to plead.

PROHIBITION.

The facts sufficiently appear from the head-note and judgment.

July 27.

On July 27th

Salomons, Q.C., and *T. C. J. Foster* appeared for the defendant in support of a rule *nisi* for a prohibition on the grounds:—1. That no information charging any offence, or summons embodying such information had been issued or served on the defendant. 2. That the substance of the complaint or information was not stated to the defendant, and the defendant was not called upon to plead guilty or not guilty, or to shew cause why he should not be convicted. They relied upon *Blake v. Beech* (1).

Rogers, in support of the conviction, shewed cause. As to the first point, he distinguished *Blake v. Beech* (1)—see the judgment of the Court *infra*—and cited *R. v. Butterworth* (2). As to the second point, he cited *R. v. Hughes* (3), *Paley on Convictions* (5th ed. p. 97), *Ex parte Ah Yee* (4).

Salomons, in reply.

Our. adv. vult.

Dec. 16.

On December 16 the judgment of the Court was delivered by The CHIEF JUSTICE. This was a motion for a rule absolute for a prohibition directed to Mr. Buchanan, one of the stipendiary magistrates of the city, upon two grounds. 1st. That no infor-

(1) L.R. 2 Ex. D. 335; 48 L.J. M.C.
151.

(3) L.R. 4 Q.B.D. 614.

(4) 1 Weekly Notes (N.S.W.) 62.

(2) Wilk. Aust. Mag. 770

mation charging any offence had been issued or served on the defendant. 2nd. That the substance of the charge was not stated to the defendant, nor was the defendant called upon to plead, or to shew cause why he should not be convicted. The proceeding before the magistrate was under the 14th Vic. No. 9. A complaint had been made to a justice of the peace under section 1 of that Act that a room kept by the applicant in a house situate at No. 50 Goulburn-street was used as a common gaming-house. Thereupon the justice gave authority by special warrant, in the form prescribed by the Act, to enter and search the said house, and to arrest and search and bring before a justice of the peace, as well the keeper of the said house, as all other persons there haunting, resorting, or playing. Accordingly, by virtue of this warrant, a police constable went to the house in question and found a number of men sitting round a table gambling at a game called fan-tan. The applicant was standing looking on. He was, thereupon, by virtue of the warrant, arrested as being the keeper of the house, and brought before a justice of the peace, who remanded him, allowing bail. A recognisance of bail was thereupon entered into, the condition shewing that the applicant undertook to appear to answer further to the complaint of keeping a common gaming-house. On the applicant's appearance on the day mentioned in the recognisance, the attorney for the applicant took the point that an information should be laid and a summons issued and served on the defendant, relying on the case of *Blake v. Beech* (5). This point was overruled; the case proceeded, was clearly proved, and the applicant was fined 25*l.*, or, in default of payment, three months' imprisonment. The second point before us, and which was strongly insisted upon, does not appear to have been taken before the magistrate. We are of opinion that the conviction was right, and should be sustained. We do not think that in a proceeding under this Act it is necessary to present a second information; and that the applicant, having been arrested under the search-warrant, was properly before the Justice, and was by him properly remanded upon bail, and might afterwards, without any fresh information, be properly convicted of an offence under

1887.

Ex parte
AH HING.

The C.J.

1887.

Ex parte
AN HING.

The C.J.

the Act in pursuance of the provisions of which the information was laid. In *Blake v. Beech* (6), the prisoner was arrested under the 8 and 9 Vic., cap. 109, corresponding to our 14th Vic. No. 9, and, then being in custody, was convicted of an offence under the provisions of the 16th and 17th Vic. cap. 119, without any fresh information or summons disclosing an offence under the latter statute. This was held by the majority of the Court to be fatal to the conviction. The distinction between that case and this is apparent. Here the information, the warrant, the arrest, the charge, and the conviction are under the same Act. In *Regina v. Butterworth* (7), the then Chief Justice, Sir Alfred Stephen, held that in order to convict under this Act no fresh information is necessary, and that decision, given in Chambers, we deem to be correct. It is then contended that the conviction is bad because the charge against the applicant was not stated to him, nor was he called upon to plead thereto or show cause why he should not be convicted, and that such a course of proceeding, being opposed to the provisions of the 14th section of the 11 and 12 Vic. cap. 43, is fatal to the conviction. It appears, however, from the affidavit of Mr. Williamson, that at the hearing the information to ground the search warrant was read, and the case proceeded as if the applicant had pleaded not guilty. If we could see that the formalities required by this 14th section were not complied with, this rule should be made absolute. But we fail to see that in this matter all that should have been done has not been done. The point was not taken before the magistrate, which is itself perhaps a sufficient answer. However, we think it sufficiently manifest that when the applicant was remanded and bail allowed, the charge, which is abundantly stated in the condition to the recognisance signed by the applicant, must then have been made, and he must have been then asked how he pleaded; at all events there is no proof that he was not; and then on the day fixed he, in pursuance of his bail, appears to shew cause. We are, therefore, of opinion that the conviction was correct, and accordingly this rule is discharged with costs.

Rule discharged, with costs.

Attorneys for applicant: *Williamson & Williamson.*

SIMAT' v. SILVA.

1887.

Negligence—Master and servant—Defect in machinery—Equal knowledge—Volenti non fit injuria.

July 26, 27.
Dec. 16.

The C.J.
Innes J.
and
Stephen J.

The plaintiff, the engineer of a steam tug belonging to the defendant, who was also the captain, complained to the defendant of a leak in the boiler, which to the plaintiff's knowledge had been recently repaired. These complaints were made before the vessel left her moorings at Sydney, and again while she was on her way to Watson's Bay, in Port Jackson. At that place she was examined, but the cause of the leak could not be discovered. The defendant, nevertheless, ordered the plaintiff to proceed to sea, promising that the defect should be remedied when the vessel returned to Sydney. The plaintiff obeyed this order, and while at sea sustained injuries from an explosion caused in all probability by this defect. The plaintiff sued the defendant for negligence.

Held, that as the plaintiff's knowledge of the risk was equal to, if not greater than, that of the defendant, the latter was not liable; and the plaintiff, having obeyed the order to go to sea, which he was not bound to do, had voluntarily encountered the risk, and therefore, in accordance with the maxim *volenti non fit injuria*, could not recover.

DISTRICT COURT APPEAL.

Action to recover damages for injuries sustained by the plaintiff, engineer of the steam-tug "Young Dick," of which the defendant was owner and captain, through an explosion caused by a defect in the machinery.

The facts as they appeared from the plaintiff's evidence were as follows:—The plaintiff had been six months in the defendant's employment as engineer of the "Young Dick." A short time before the accident a plug of a tube in the boiler had given way, and had been repaired. A rod of iron had been put through the defective tube and screwed up with a nut at each end. On the 27th of September, 1886, the plaintiff discovered that the boiler was leaking, but could not see where. He told the defendant, who said, "Never mind, we must go on." The plaintiff said, "All right, you are the master." The following morning the plaintiff told the defendant the leak was worse. The defendant nevertheless at 6 a.m. left the wharf at Sydney, and the vessel proceeded to Watson's Bay. There steam was shut off, and the plaintiff and defendant went down into the engine-room and took off the plates, and made a further examination, but could not discover where the leak was. On

1887.
SIMAT
v.
ILV

the way the plaintiff again complained that the leak was increasing. On arrival at Watson's Bay, the plaintiff told the defendant the vessel was not fit to go to sea. The defendant swore at him, and said she must go, and that when they got back she should be attended to. The plaintiff obeying the defendant's order, proceeded to sea, and outside the Heads two schooners were taken in tow. Just as the vessel was entering the Heads, as the plaintiff was making up the fire, he heard a whistle; thinking the gauge was broken, he turned round, and as he did so, a quantity of fire, ashes and steam rushed out and scalded and burnt the plaintiff so severely that he was confined to his bed for 12 days and to the house for three weeks.

A nonsuit was moved for on the ground that there was no affirmative evidence given as to how the accident occurred, and secondly, that there was contributory negligence on the part of the plaintiff in going to sea, knowing of the risk. The Judge (*Douling*) refused to nonsuit.

For the defendant, Mr. Selfe, engineer to the Marine Board, proved that the repair to the tube had been properly effected, and that the accident probably happened through one of the nuts having come unscrewed. He gave a certificate in June, 1886, that the steamer was in good order. In December he examined her again, another tube had then been inserted in the place of the one which had been previously mended by passing the rod through it. He was of opinion that the accident was not caused by a leak in the boiler. The defendant admitted that he examined the boiler at Watson's Bay, and that he said he would have the boiler repaired when the vessel returned to Sydney. It was also proved that one of the plugs or nuts of the rod was found, after the explosion, at the back of the boiler, amongst the bricks.

In reply the plaintiff denied that he had ever touched the nuts to screw or unscrew them.

The Judge found upon the evidence that the plaintiff did not interfere in any way with the nuts, and that the rod must have been imperfectly screwed at one end; that there was a leak somewhere; that the plaintiff made this known to the defendant, &c., as stated in the plaintiff's evidence. He was also

of opinion that the plaintiff could not under the circumstances have declined to proceed to sea, and that he was certainly not guilty of contributory negligence. The Judge also found that the cause of the accident was the defective state of the boiler, and gave a verdict for the plaintiff, with 30*l.* damages.

The defendant appealed, and a rule nisi was granted on the following grounds :—

1. That there was no affirmative evidence of negligence to go to the jury; 2. That there was evidence of contributory negligence on the part of the plaintiff in voluntarily continuing in the service of the defendant after he became aware of the risk attached thereto; 3. That even if there was negligence on the part of the defendant there was no evidence that such negligence was the cause of the injury to the plaintiff.

Field, for the defendant, in support of the rule. Where a servant has knowledge of the risk incurred equal to the knowledge of the master, the latter is not liable: *Williams v. Olough* (1), where on demurrer it was held that the declaration was bad if it did not negative the servant's means of knowledge. And in *Priestley v. Fowler* (2) judgment was arrested on the same ground.

[THE CHIEF JUSTICE. As it is pointed out in *Dynen v. Leach* (3), the plaintiff knowing of the danger should not have gone on. So here the plaintiff voluntarily encountered the risk.]

Further, in the plaintiff's case there is no evidence to explain how the accident arose. There must be affirmative proof by the plaintiff of negligence on the part of the defendant to support the action: *Welfare v. Brighton Railway* (4).

[SIR G. INNES, J., referred to *Watling v. Oastler* (5)].

So in *Metropolitan Railway Co. v. Jackson* (6), Lord Cairns (at p. 198) said: "The negligence must in some way connect

(1) 3 H. & N. 258; 27 L. J. Ex. 325. . (4) L.R. 4 Q.B. 698; 38 L.J. Q.B. 241.

(2) 3 M. & W. 1.

(5) L. R. 6 Ex. 73; 40 L. J. Ex. 43.

(3) 26 L. J. Ex. 221.

(6) 3 App. Cas. 193; 47 L.J. C.P. 303.

1887. itself, or be connected by evidence, with the accident. It must
 SIMAT be, if I might invent an expression, founded upon a phrase in
 v. the civil law, *incuria dans locum injuriæ*.”
 SILVA.

[He also cited *Alsop* or *Assop* v. *Yates* (7).]

Coffey for the plaintiff shewed cause. In *Holmes* v. *Clarke* (8), it is laid down that if a servant complains to his master of the dangerous state of machinery, and the master promises that it shall be repaired, the master is liable if in the meantime an accident occurs.

[The CHIEF JUSTICE. Is not this a different case from *Holmes* v. *Clarke* (8). Here the danger was continuing every moment.]

Holmes v. *Worthington* (9) is very like this case. There it was held that a servant knowing of a defect in machinery, which he had to work, and voluntarily continuing to use it, after complaint, and in the expectation that it would be repaired, was not precluded from recovering against his master. A defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury: *Olayards* v. *Dethick* (10).

[The CHIEF JUSTICE. That case was discussed in *Laz* v. *Corporation of Darlington* (11), by *Bramwell*, L.J., and questioned in *McMahon* v. *Field* (12), by the same learned Judge, at p. 594.]

But where the master has promised to have the defect remedied, he is liable for any accident that may occur, until his promise is fulfilled: *per Cockburn*, C.J., in *Clarke* v. *Holmes* (13).

The plaintiff is not bound to prove affirmatively what was the exact *causa causans* of the accident. The accident having clearly been caused by a defect in the boiler, the defendant's liability

(7) 2 H. & N. 768; 27 L.J. Ex. 769.

(10) 12 Q.B. 439.

(8) 6 H. & N. 349; 30 L. J. Ex. 135:

(11) 5 Ex. Div. 28.

and on appeal 7 H. & N. 937; 31 L. J.

(12) 7 Q.B.D. 591.

Ex. 356.

(13) 7 H. & N. at p. 944-5.

(9) 2 F. & F. 533.

for negligence began as soon as he was informed that the machinery was out of order.

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Field in reply. In *Holmes v. Clarke* (14), the defendant was under a statutory obligation to fence the machinery. Also in that case and in *Holmes v. Worthington*, the defendant had had an opportunity of fulfilling the promise to repair. Here the defendant had no such opportunity, since it was impossible to repair the boiler till the steamer returned to Sydney. The Court will order that a nonsuit be entered, if they think the plaintiff ought to have been nonsuited below: *Hammack v. White* (15).

[*Coffey*. Where a nonsuit is refused and the defendant goes into evidence and cures any defect in the plaintiff's case, the whole of the evidence will be taken into consideration. *Allen v. Cary* (16).]

[*Indermaur v. Dames* (17) was also referred to in the course of the argument.]

Cur. adv. vult.

On December 16th, the judgment of the Court was delivered by

Dec. 16.

The CHIEF JUSTICE. This was an appeal from a decision of Mr. District Court Judge *Dowling*, which was argued before their Honours Mr. Justice *Innes*, Mr. Justice *Stephen*, and me. The evidence disclosed that the plaintiff was an engineer on board a tug steamer, of which the defendant was owner and master, and it appears that through some defect in the boiler a quantity of water suddenly escaped into the furnace, causing steam to be there suddenly generated, which, rushing out of the furnace doors, and carrying with it ashes and cinders, injured the plaintiff severely. The plaintiff thereupon brought this action against the defendant for negligence. It appears that some short time previous to the accident taking place, the boiler had

(14) 2 F. & F. 533.

(16) 7 El. & B. 463.

(15) 11 C.B.N.S. 538; 31 L.J.C.P.

(17) L.R. 1 C.P. 274; 35 L.J.C.P.

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to the plaintiff's knowledge been repaired, one of its tubes which had become defective had been closed by passing a rod down it, and, in effect, sealing up its ends. The day before the accident took place the plaintiff discovered that the boiler was leaking more than usual, and mentioned this to the defendant, who told the plaintiff not to mind, but to go on. The next day, the boiler still leaking, the plaintiff again complained, whereupon, the vessel being at Watson's Bay, an examination was made by the plaintiff and the defendant into the cause of the leak, without discovering it. The defendant, notwithstanding this, gave orders to proceed to sea in order to look out for vessels, and stated that when the vessel got back to Sydney her boilers should be attended to. The plaintiff accepted this order—which, if he deemed there was a risk of danger, he was not bound to do—*Lax v. The Corporation of Darlington* (18)—proceeded to sea, and while doing so the accident occurred. Now, it is apparent that, if the boiler's leaking was the cause of the accident, or if this denoted that what did occur might occur, all the information which the defendant possessed as to the state of things he obtained from the plaintiff. So that the plaintiff, being the engineer of the vessel, probably knew more of the matter than the defendant, or at least knew as much. This circumstance of itself is sufficient to prevent the plaintiff's recovering in this action. In order to recover in such an action, the plaintiff must prove two things—first, that the boiler was unfit for the purpose for which it was used; secondly, that the defendant knew this, while the plaintiff was ignorant of it—*Griffiths v. The London and St. Katherine Docks Company* (19). If, as the evidence here establishes, the plaintiff was as well informed as the defendant, then the maxim *volenti non fit injuria* applies, and the plaintiff cannot recover: *Thomas v. Quartermaine* (20). The defence in this case does not, as the District Court Judge seems to have thought, rest upon the doctrine of contributory negligence, but upon the doctrine *volenti non fit injuria*. These two defences are entirely distinct ones from the other. How important it is when dealing with this class of cases to carefully distinguish between these separate defences is shown

(18) 5 L.R., Ex. D. 28, 35 (19) 12 Q.B.D. 493. (20) 18 Q.B.D. 685-701.

by the judgment of *Bowen*, L.J., in the case last cited at page 697. The evidence may be taken to show that both plaintiff and defendant were aware of some defect in the boiler which it was intended to remedy. Whether the known defect was sufficient to cause risk of injury, or whether it was the actual cause of the accident, is doubtful; but as to whether it was or not the plaintiff must be taken to have been better informed than the defendant, and, therefore, cannot recover. *Holmes v. Clarke* (21), which was much relied upon by the plaintiff, has no bearing upon this case. In *Thomas v. Quartermaine* (22), already referred to, *Bowen*, L.J., points out at page 696: "But where the danger is one incident to a perfectly lawful use of the defendant's own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the defendant at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one—viz., that the risk has been voluntarily encountered—the defence seems to me complete." In this case there was knowledge in the plaintiff, and the risk, if any such was believed to exist, was voluntarily encountered by him. We are therefore of opinion that the verdict entered for the plaintiff was erroneous, that such verdict should be set aside, and a verdict entered for the defendant, with costs; the plaintiff must also pay the costs of this motion.

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The C.J.

Rule absolute with costs.

Attorneys for plaintiff: *Bradley & Son.*

Attorney for defendant: *A. M. Castle.*

NOTE.—See the recent case of *Yarmouth v. France* (19 Q.B.D. 647), in which *Thomas v. Quartermaine* (18 Q.B.D. 685) is commented on and distinguished.]

(21) 7 H. & N. 937, and in 30 L.J. Ex. 135; 31 L.J. Ex. 356.

(22) 18 Q.B.D. 685-701.

1887.

MANN v. SMITH (No. 2).

Nov. 7 & 19.

Libel—Privileged communication—Mutual interests.

Innes J.
Deffell J.
and
Owen J.

In an action for libel, the defendant, acting in the interests of the creditors of the plaintiff, who had sequestered his estate, entered into negotiation with the solicitor of the plaintiff's wife, who had considerable property settled to her separate use, to make arrangements for the mutual benefit of the plaintiff and his creditors. During the progress of the negotiation the defendant, at the request of the solicitor, wrote the latter a letter in which he made grave charges of misconduct against the plaintiff, and further, offered to keep back certain proceedings which would render the plaintiff liable to penalties under the Insolvency Act. This letter was published, and is the libel declared upon. The Judge at the trial ruled that the occasion was not privileged, and the plaintiff recovered 200*l.* damages.

Held (on motion for a new trial), that the letter was written on a privileged occasion; and that the case must go down for a new trial in order that the questions of *mala fides* and malice might be submitted to a jury. Rule absolute for a new trial.

NEW TRIAL MOTION.

LIBEL. The declaration is reported in 7 N.S.W. L.R. 441. At the trial it appeared that the plaintiff, James Elliott Mann, had been in business in Sydney as an importer of pianos, and having, in April, 1885, called a meeting of his creditors, the defendant, Harold Selwyn Smith, an accountant, &c., attended that meeting as representative of a certain creditor of the plaintiff. Subsequently the defendant saw Ellis, the solicitor of the plaintiff's wife, with the view to make some arrangement by which the plaintiff might satisfy his creditors, and the plaintiff and his wife gave promissory notes to the amount of 8000*l.* After this, in August, 1885, the plaintiff sequestered his estate, and in December following published a notice of intention to apply for a certificate of conformity. Then the defendant again called on Mrs. Mann's solicitor, and after some conversation it was arranged that defendant should write a letter to Ellis, telling him all about the affairs in the matter of the plaintiff's insolvency. The object of the letter was to induce Mrs. Mann's trustees and the plaintiff's mother-in-law, for whom Ellis also acted, to furnish the money required to enable the plaintiff to pay 20*s.* in the pound. This letter, which contained serious

charges of misconduct against the plaintiff, was seen by several persons, and is the alleged libel declared on.

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At the trial before *Faucett*, J., it was contended on behalf of the defendant that the letter was a privileged communication, and that it was incumbent upon the plaintiff to prove malice on the part of the defendant. His Honour declined so to rule, and the matter went before the jury to say whether the letter was a libel or not. The jury found a verdict for the plaintiff, with damages 200*l*.

A rule *nisi* for a new trial was obtained by the defendant on the ground (among others) that his Honour ought to have ruled that the occasion when the defendant wrote to Mr. Ellis was a privileged occasion.

On the 7th November, 1887,

Nov. 7.

Rogers and *O. B. Stephen* for the defendant, moved to make the rule absolute.

Rogers (after the evidence was read). In libel, when the occasion is privileged, it is for the plaintiff to show *mala fides*: *Clark v. Molyneux* (1). Though defendant was not a delegate from the creditors, he was acting in their interests; he had no wrong motive: *Beatson v. Skene* (2); *Spill v. Maule* (3); *Roscoe*, N.P. 14th ed., p. 805.

O. B. Stephen followed on the same side. Every man ought to tell all he knows: *Odgers*, p. 274; *Robshaw v. Smith* (4). There were mutual interests between Ellis and defendant, which made the occasion privileged: *Harrison v. Bush* (5); *Starkey on Libel*, 526; *MacDougall v. Claridge* (6); *Bennett v. Deacon* (7); *Story v. Challands* (8).

Salomons, Q.C. (*Gibson* with him), shewed cause. The question of privilege is decided by authority. There must be a legal, moral, or social duty to justify the utterance of libellous words: *Folkard on Slander* (4th ed. 284); *Waring v. Macaulay* (9).

(1) 3 Q.B.D. 237; 47 L.J. Q.B. 230.

(6) 1 Camp. 266.

(2) 5 H. & N. 838; 29 L.J. Ex. 430.

(7) 2 C.B. 628; 15 L.J. C.P. 289.

(3) L.R. 4 Ex. 232; 38 L.J. Ex. 138.

(8) 8 C. & P. 234.

(4) 38 L.T. 423.

(9) 7 L.R. (Irish) 282.

(5) 5 E. & B. 344; 25 L.J. Q.B. 25.

1887. Defendant had no such duty, and he consulted Ellis without the knowledge of the creditors: *Dickeson v. Hilliard* (10). The letter proposed a violation of the *Insolvent Act*, and was not privileged.

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[INNES, J. On the authority of *The Queen v. McGrave* (11), the letter does not charge the plaintiff with offences against s. 73 of 5 Vic. No. 17.]

Parsons v. Surgey (12). There must be a duty: *Purcell v. Sowler* (13); *Martin v. Strong* (14); *Brooks v. Blanchard* (15); *Coshead v. Richards* (16); *Ellis v. Bank of Australasia* (17).

Rogers, in reply. Our interest sent us to Ellis. If the language is *bonâ fide* it is relevant to the business: *Cooke v. Wildes* (18). Plaintiff must remove the presumption of the occasion being privileged: *Clarke v. Molyneux* (19). There was no suggestion to compound a felony, as the accusations were of misdemeanours. [He also cited *Tuson v. Evans* (20).]

Our. adv. vult.

Nov. 19.

On November 19th the judgment of the Court was delivered by SIE GEORGE INNES, J. In this action the plaintiff seeks to recover damages for the publication of an alleged libel upon him under the following circumstances:—Prior to August, 1886, the plaintiff was engaged in business in the importation of pianos, having in October, 1883, entered into partnership in that business with one Horace Brinsmead. Shortly after entering into that partnership the firm became involved in financial difficulties. The plaintiff had married a young lady of the name of Farrell, a member of a wealthy family. The money with which the plaintiff commenced business was 3000*l.*, 2000*l.* of which were lent to him by his mother-in-law, Mrs. Farrell; and 1000*l.* by his brother-in-law, Mr. Farrell. Mrs. Mann had considerable means

(10) L.R. 9 Ex. 79; 43 L.J. Ex. 37.

(16) 2 C.B. 569; 15 L.J. C.P. 278.

(11) Wilk. Aust. Mag. (4th ed.) 781.

(17) 3 N.S.W. L.R. 97.

(12) 4 F. & F. 247.

(18) 5 E. & B. 328; 24 L.J. Q.B. 367.

(13) 2 C.P.D. 215; 46 L.J. C.P. 308.

(19) 3 Q.B.D. 237; 47 L.J. Q.B. 230.

(14) 5 Ad. & E. 535.

(20) 12 A. & E. 733.

(15) 1 Cr. & M. 779; 3 Tyr. 844.

of her own settled upon her, and vested in trustees on her marriage settlement. Mrs. Farrell, the plaintiff's mother-in-law, is a lady of considerable wealth. The plaintiff, finding that his firm was in difficulties, induced his wife, under circumstances more particularly referred to hereafter, to enter into a guarantee with the Union Bank to the extent, it is stated, of some 8000*l.*, and to give promissory notes to the extent of some 7000*l.* or 8000*l.* The firm of which the plaintiff was a member, carrying on business under the name of Brinsmead and Co., had become largely indebted to the firm of John Brinsmead and Sons in England. John Brinsmead and Sons had given to Horace Brinsmead, the plaintiff's partner, a power of attorney to act for them, and that power Horace Brinsmead, in February, 1885, transferred to the defendant, who is an accountant, arbitrator, and general agent. In April, 1885, the plaintiff called a meeting of his creditors. Horace Brinsmead having requested the defendant to attend that meeting as representative of John Brinsmead and Sons, the defendant on the 8th April, 1885, wrote a letter suggesting that the plaintiff should call on him in order that some arrangement should be made. In pursuance of that letter the plaintiff, on the 9th April, called on the defendant. This is the first occasion on which, so far as is to be gathered from the evidence, plaintiff and defendant were brought together. Plaintiff and defendant conversed at length upon the financial affairs of the firm, and entered largely into some suggested misconduct of the plaintiff, with special reference to the misappropriation by plaintiff of specific moneys of John Brinsmead and Sons. At that interview the plaintiff expressed a wish that the defendant should attend the proposed meeting of creditors next day, and there represent John Brinsmead and Sons. The defendant did so, occupying the chair, and taking an active and prominent part in the proceedings of the meeting. Subsequently to that the defendant and plaintiff had repeated interviews in the months of April and May. In May the plaintiff proposed to the defendant that his wife should give a guarantee to the extent of some 8000*l.* Defendant remonstrated upon this proposal to involve the wife so largely, and inquired of plaintiff who his wife's solicitor was. The plaintiff informed him, Mr. Ellis. Defendant proposed

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1887. that he should see Ellis on the matter, but to this the
MANN plaintiff would not assent. Shortly after this a deed of
v. assignment, or rather of arrangement, was prepared, and
SMITH. contemporaneously with the execution of that deed the
Innes J. plaintiff and his wife gave joint and several promissory notes to
the amount of 7000*l.* or 8000*l.* The defendant at this time was
acting for all the creditors excepting the Union Bank and a Mr.
Sands. In July, partly, as the defendant alleges, in consequence
of a statement made to him by a clerk of a Mr. Royle, one of the
creditors, and partly in consequence of a letter from the
plaintiff, which was then shewn to the defendant (but of the
contents of which we knew nothing), the defendant saw Mr.
Ellis upon the affairs of plaintiff, and with special reference
to the liability of the plaintiff's wife in connection with the
affairs of the firm, and had a lengthy conversation with him on
the subject. Ellis seems to have then asked the defendant to
furnish him with full information upon the matter. Defendant and
Ellis had several subsequent interviews on the same subject, and
in the course of them the position and interests of Mrs. Farrell,
the plaintiff's mother-in-law, who had largely assisted the
plaintiff with money, and for whom Ellis was, and for years had
been, solicitor, were freely discussed. Notwithstanding these
interviews and various efforts to prevent plaintiff from going
into the Insolvency Court, the sequestration of his estate took
place on the 10th of August, 1885. That sequestration was
voluntary on the part of the plaintiff, and it being manifest that
he was liable, not only for his own private debts, but also for
the debts of Brinsmead & Company, they were included in the
plaintiff's schedule of liabilities. Mr. Edward Stephen was
appointed official assignee. Mr. Stephen, upon the instructions
of all the creditors, except the Union Bank, instructed the
defendant to make full investigations with a view to the elucidation
of the affairs of the insolvent, the plaintiff. From July to
December the defendant does not appear to have seen Mr. Ellis
upon the matter. In the meantime several examinations had
been held in the Insolvency Court. The plaintiff, on the 8th of
December, published in the *Gazette* notice of his intention to
apply for his certificate of conformity, and there is no question

that some of the creditors intended strenuously to oppose that application. In this state of circumstances the defendant again called on Ellis. The defendant's evidence upon this point of the case is as follows:—"I went to Mr. Ellis again on the 21st December, and I had a very long conversation with him. I told him I had come again to see him about Mann's affairs, not as representing the creditors, but to have a private and confidential chat with him to see whether some arrangement could be made to prevent the proceedings which I was instructed by the creditors to take." Further on, Ellis having inquired of him what would it take to make a compromise with the creditors, the defendant says, "I told him, 'You'll make no compromise with the creditors, for they are all very angry, and I don't come from the creditors at all.' " In a long conversation between the defendant and Ellis the whole matter was fully discussed, the defendant pressing Ellis, as representing Mrs. Farrell and the trustees of Mrs. Mann, to lay before them the expediency of paying such an amount of money as would, with a sum that defendant stated Horace Brinsmead would pay, give the creditors twenty shillings in the pound, with a view to stopping all proceedings in and arising out of the insolvency, Ellis, at the conclusion of the interview, said, "You write me a letter embodying the accounts, and telling me all about the affairs, telling me also that you think Mann cannot get his certificate, and also that other proceedings may be taken against him," adding that the letter should be, as all their prior conversations had been, regarded as strictly confidential. The defendant promised to write such a letter, and it is clear that the letter was to be used as a means to influence Mrs. Farrell and the trustees of Mrs. Mann's settlement to furnish the required money. The letter was written by defendant to Mr. Ellis, on the 2nd January, 1886. It was shown by Ellis to Mrs. Farrell, and probably to the trustees of Mrs. Mann, and its substance was conveyed (we are not told exactly how) to the knowledge of the plaintiff. The letter is the alleged libel declared on. It is a lengthy document, and beyond all question contains charges of misconduct of a very serious character against the plaintiff, and many statements in the letter are in a high degree defama-

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tory ; so that, apart from the question of privilege, the letter is clearly libellous. At the trial before his Honour Mr. Justice *Faucett*, the defendant, on the plea of not guilty, contended that the occasion was privileged, and that the letter was privileged, and that it was therefore incumbent upon the plaintiff to prove actual malice or an absence of *bona fides* on the part of the defendant. His Honour declined so to rule, and the case went to the jury, formally, no doubt, for them to say whether the letter was a libel or not, but really merely as a matter of assessment of damages. The jury found a verdict for the plaintiff, with damages 200*l*. The case now comes before us on a motion for a new trial as a pure question of law, whether under the circumstances stated above, the letter was privileged. It is admitted by the counsel for the plaintiff that if the letter was privileged there must be a new trial. Upon this question of qualified privilege we are not aware that, as a general proposition, the "legal canon," as Lord *Campbell* calls it, propounded in argument and adopted in the considered judgment of the Court of Queen's Bench in the well-known case of *Harrison v. Bush* (21), can be improved upon. That canon is as follows:—"A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter which, without this privilege, would be slanderous and actionable." The meaning of the words "interest" and "duty" are exemplified in that case. The defendant there had complained to a Secretary of State of serious misconduct on the part of the plaintiff in the exercise of his office as a justice of the peace. Lord *Campbell* says:—"Little need be said to show that the writer of the letter had both an interest and a duty in the subject matter of the communication. Assuming that the plaintiff had misconducted himself as a magistrate in the manner alleged, all the electors and inhabitants of Frome had suffered a grievance by a magistrate having fomented the riot instead of quelling it, and having endangered instead of protecting life and property within the borough. They have an interest that

they may not longer remain subject to the jurisdiction of a magistrate who so violates the law, and it was the duty of those who had witnessed the offence to try by all reasonable means in their power that it should be inquired into and punished. 'Duty' in the proposed canon cannot be confined to legal duties which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation." Now, in considering and deciding whether a communication is or is not privileged, the Court must have regard to all the circumstances disclosed by the evidence. What was the relation of the parties to the subject matter, and, with reference to that subject matter, to one another? What is the character of the communication itself, how far is it relevant; are its expressions justifiable or not under the circumstances—that is, do they, or do they not, manifestly go beyond all bounds of common sense, so that the language is not merely intemperate or even unduly strong or violent, in which case it would have to go to the jury—but is it altogether incapable of justification? See *Fryer v. Kinnersley* (22), *Cooke v. Wildes* (23), *Spill v. Maule* (24), *Cowles v. Potts* (25). Is, or is not, the communication manifestly tainted with a want of *bona fides*, or with evident and unmistakable malice? In short, is it, or is it not, within the scope of any legitimate "interest" or "duty" of communicator and person communicated with? Each case must depend upon its own circumstances. Difference of opinion in the application to given circumstances of well-understood rules of law have been not unfrequent amongst Judges, and eminently so in this particular branch of law. See *Cozhead v. Richards* (26); *Bennett v. Deacon* (27). It is not enough that some of the circumstances indicated in the above-quoted "legal canon," as being the necessary ingredients to a privileged communication, exist; it seems to us that a communication must, *primâ facie*, have all those ingredients before it is entitled, as a matter of law, to be regarded as a privileged communication, and as such either to entitle the defendant to a nonsuit or to have the matter submitted to a jury

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(22) 15 C.B. N.S. 422.

(23) 5 E. & B. 328.

(24) L.R. 4 Ex. 232.

(25) 34 L.J. Q.B. 217

(26) 2 C.B. 569.

(27) 2 C.B. 628

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for determination upon the questions of fact as to *bona fides* or actual malice. We have been referred to several cases, which more or less illustrate these propositions, but we do not deem it necessary to dwell upon them in detail. With the question of what are the respective functions of the Judge and the jury in cases which are admittedly cases of privileged communications, we have in this case no concern. The case of *Spill v. Maule* (28) is, upon part of this case, much in point. There the defendant was a creditor of the firm of which the plaintiff and another were partners. The plaintiff and his partner got into financial difficulties, and the defendant, who had been engaged in winding up their affairs, wrote a letter to a firm who were also creditors, in which he imputed disgraceful and dishonest conduct to the plaintiff with regard to the available assets of the estate. It was held—indeed, admitted not to be capable of doubt—that the occasion was privileged, on the ground of the interest which the defendant had in the winding up of the affairs of the plaintiff and his partner. Now, applying that case to the circumstances of this, it seems to us that the occasion here was privileged on the same ground as that on which in *Spill v. Maule* the occasion was held to be privileged, viz., the interest which the defendant had in the winding up of the affairs of the plaintiff, and his employment by many—the majority—of the creditors in the progress of the plaintiff's insolvent estate through the Court in Insolvency. His Honour who tried the case seems, although on the motion for a nonsuit he held the communication to be privileged, to have held that—as the defendant said at the trial, that in his interview with Ellis on the 21st December he did not go there on behalf of the creditors—this destroyed the privilege. We are unable to agree with his Honour in this view. The terms of the letter itself seem to us to indicate that it was written in the interests of the creditors who had employed him, and on their behalf. It may well be, and probably is, the fact that the defendant was not authorised by those creditors to propose all the terms which are proposed in the letter; but that he was employed by them to obtain for them as near an approach to 20s. in the pound as might rightly have been obtained, there

can be no doubt; and that the obtaining 20s. in the pound for those creditors was a main feature of defendant's proposition is manifest. We think, therefore, that notwithstanding that portion of defendant's evidence which seems to have affected his Honour's mind, the occasion created a privilege, and that in a communication to Ellis (who may be looked upon, and indeed has been throughout treated as the representative of Mr. Farrell, a creditor in the estate, and of Mrs. Mann, and her trustees, who also had a large pecuniary interest in the matter) the defendant might have used defamatory expressions concerning the plaintiff in relation to the subject matter, which defamatory expressions would, as matter of law, have been, *primâ facie*, privileged. We are, however, obliged to look at the character of the communication. It is contended on the part of the defendant that the occasion having created a privilege, his Honour should have nonsuited the plaintiff, or have directed a verdict for the defendant, on the ground that there was no evidence of *mala fides* or of malice to rebut the presumption which arose in favour of the defendant by reason of the occasion having created a privilege. On the part of the plaintiff it is contended that, even admitting that the occasion created a privilege, the letter itself was such as so obviously and manifestly did not come within the privilege created by the occasion, and that the Judge would not have been justified in letting it go to the jury as a *primâ facie* privileged communication. It is unquestionable that in some cases, although the occasion may have created a privilege to make with impunity (unless *mala fides* or express malice be proved) defamatory statements concerning the plaintiff, yet the nature and character of the communication may manifestly be such as to place the communication, as matter of law, outside the privilege. For instance, if the defamatory statements are utterly irrelevant to, and have no possible connection with, the subject matter in respect to which the occasion arises, as in the case put in the judgment in *Cowles v. Potts* (29), the Judge at the trial or the Court in Banco would hold that such statements were not privileged. In *Cowles v. Potts*, Blackburn, J., says :—" The plaintiff cannot,

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as we think, complain of any statement honestly made, if pertinent to the question whether the plaintiff was fit to be trusted, and every statement relating to his honesty and previous conduct in business was pertinent to such a question. If the defendant had made statements injurious to the plaintiff's character on some matter not in any way connected with the subject of his fitness to be a trustee, as if, for instance, there had been a statement made that he had beaten his wife, that would have been wholly unwarranted by the occasion, and would consequently not have been privileged." Other illustrations readily occur, but we proceed to the case immediately before us. The letter containing the alleged libellous matter is a somewhat remarkable document. At the trial it was contended, though perhaps not very strongly urged, that the letter could not be even *prima facie* privileged, as it amounted to a proposition to compound a felony. His Honour, we understand, did not see that the letter contained any such proposition; but the tendency of the learned Judge's remarks upon that subject, so far as those remarks have been brought before us, is by no means opposed to the inference that if he had so viewed the letter he would have held that it could not be privileged. Now, none of the offences which in the 73rd section of our *Insolvency Act* (5 Vic. No. 17) are declared to constitute fraudulent insolvency, are technically felonies. The person convicted of the crime of fraudulent insolvency is liable to a sentence of 15 years' transportation (now the substituted period of hard labour on the roads), but technically, the crime is a misdemeanour. The letter, therefore, does not charge the plaintiff with having committed a felony. Technically, also it may be, on the authority of *Regina v. M'Grave*, reported in the appendix to *Wilkinson's Plunkett's Australian Magistrate* (4th edition, p. 781), that the letter does not charge the plaintiff with any offence under the 73rd section of 5 Vic. No. 17; but the letter certainly does charge the plaintiff with having committed offences punishable, under sections 18 and 19 of 7 Vic. No. 19, with imprisonment for 12 months. The language of the letter is in some places very strong, and to us, looking at it as a whole, it seems fairly arguable—to say the least of it—that it might be construed as containing a proposition

for a money consideration not merely to compromise or settle a private damage, but to forego a prosecution for offences of a public nature, and thus to frustrate the ends of public justice. If we were quite clear that was the only interpretation of which the letter is susceptible, we should have no hesitation in saying that a proposition so reprehensible could not possibly claim that the law should cast its ægis over it by the application of any immunity arising from the doctrine of privileged communication. Such a proposition would be *contra bonos mores*—illegal, if not criminal—and would so manifestly bear upon it the taint of *mala fides*, in the wide and proper acceptance of that phrase, that it could not come within the terms of the canon already referred to upon the doctrine of qualified privilege. But all the surrounding circumstances must be looked at; the extrinsic evidence, as well as the intrinsic evidence furnished by the contents of the letter itself, must be considered, and we are not prepared to say that the letter is not capable of a more favourable construction. That being so, while we are clearly of opinion that there was in the case sufficient evidence of an absence of *bona fides*—of the existence of a corrupt or sinister motive—on the part of the writer of the letter to prevent the Judge from non-suiting or directing a verdict for the defendant, we think that the question of the interpretation of the letter must be left with the other facts of the case to the jury for them to pronounce upon the questions of *bona fides* and actual malice. It was, indeed, broadly contended for the defendant on the argument before us that, in an action for libel where the occasion had created a privilege, however reprehensible or even criminal in itself such a proposition as we have referred to might be, it could not in any way operate as matter of law to take the communication out of privilege; and the learned counsel went the length of arguing that in the clearest possible case of a proposition to compound a felony—for which proposition the writer might himself be prosecuted for the crime of attempting to compound the felony—the doctrine of privilege would still apply in favour of the writer of such a letter. The case put in illustration was that of a clerk in a merchant's office who

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is honestly supposed to have embezzled moneys of his employer, and to have committed forgeries in doing so. Some friend of the clerk, being under a fidelity guarantee to the merchant, and liable therefore to be called upon to make good the clerk's defalcations, having therein a clear interest in the matter, writes to the merchant inquiring the circumstances. The merchant, in reply, writes thus: "The clerk of whom you speak has embezzled 50*l.* of my moneys, and has committed forgeries on me in relation to his embezzlement. I intend to prosecute him, the proofs of his guilt are clear, but if you will pay me 150*l.* no prosecution shall be instituted, and I will keep the matter secret." As a matter of fact, the clerk is quite innocent, the honest supposition of his guilt has been all a mistake, and he brings an action against his employer for writing and publishing of him that letter. Now here the occasion created a privilege in the employer to write of the clerk statements criminating him. There was a corresponding interest existing between the writer of the letter and the person to whom it was written; the communication was relevant to the subject matter, and had the writer stopped at saying, "I intend to prosecute him," there can be no question that, failing evidence of *mala fides* or actual malice, no matter how mistaken in point of fact the supposition of the clerk's misconduct may have been, the Judge's duty at the trial would be to nonsuit. But as the writer had gone on distinctly to propose in the letter the criminal compounding of the felony or felonies charged, it seems to us idle to contend that the defendant could claim that the letter should be regarded as a privileged communication. The case may be new, it may not have arisen; but we have no hesitation in saying that the argument of the learned counsel is not tenable, and that it would be an opprobrium upon our system of jurisprudence if it were. For the reasons which have been given we are of opinion that the rule should be made absolute for a new trial, on the ground that his Honour was in error in holding that the letter was not a privileged communication; and that being so it is unnecessary to express any opinion upon the other grounds taken in the rule, viz., the

alleged erroneous rejection of evidence, or the alleged excessive damages.

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Rule absolute with costs for a new trial; costs of the former trial to abide the event.

Attorney for plaintiff: *McLaughlin.*

Attorney for defendant: *G. J. Sly.*

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Nov. 20.
Dec. 28.

Bill of lading—Customs Regulation Act (42 Vic. No. 19), ss. 44-49—Delivery into lighters—Indorsement of bill of lading—Union Bank Act (11 Vic.).

The indorsee of a bill of lading sought to have the goods delivered into lighters. The bill of lading provided only to have the goods delivered at a wharf in Sydney, and the sections of 42 Vic. No. 19, which provide for special delivery, had not been complied with. A general form of entry only had been used; the form containing the name of a wharf and the words "to be lightered."

*Faucett J.
Deffell J.
and
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The bill of lading was indorsed in blank by the consignor, and subsequently was indorsed in blank by a clerk of the Union Bank, Sydney, on behalf of the bank. The *Union Bank Act*, 11 Vic., enacts that all contracts, assignments, &c., to be effectual must be made by the inspector, for the time being, of the bank. The *Companies Act*, s. 79, provides that bills of exchange and promissory notes only, may be indorsed by any person acting on behalf of the company.

Held, that the defendant was not bound to deliver the goods into lighters.

Held, also (*Faucett J.*, dissenting), that the indorsement by the bank, not having been made by the inspector, is not an assignment by the bank, and does not pass the property in the bill of lading.

NEW TRIAL MOTION.

The plaintiff, as indorsee of a bill of lading of goods shipped by Brooks, Shoobridge & Co., of London, sued the defendant, the master of the ship *Argus*, for the value of certain casks of cement, being the goods mentioned in the bill of lading, alleged to have been damaged through the wilful neglect of the defendant.

The material parts of the pleadings are set out in the judgment.

The bill of lading was indorsed by Brooks, Shoobridge & Co., to the Union Bank, Sydney, and was subsequently indorsed in

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blank by a clerk of the bank. The plaintiff held the bill of lading, and afterwards indorsed it to Dalgety & Co.

When the *Argus* arrived in Sydney an ordinary customs form of entry was passed for the cement, and the defendant, after giving the necessary notices and fulfilling the requisite conditions, placed certain of the casks of cement on the wharf at which he was berthed, where the goods became damaged. The plaintiff, in his action tried before Sir G. Innes, J., in June last, contended that he was entitled, under a custom of the port, to have the goods delivered into lighters, and that owing to the refusal of the defendant to do so, and his subsequent delivery of them on the wharf, they were damaged as to a certain portion.

The defendant contended that, under the contract in the bill of lading, he was not obliged to deliver them into lighters, and further, that the indorsement of the bill of lading did not pass the goods to the plaintiff. The jury returned a verdict for the plaintiff with damages 69*l*. It was now sought to have the verdict entered for the defendant.

Salomons, Q.C. (*O'Connor* with him), for the defendant (appellant), moves for a new trial on certain grounds, the one relied on being: "That the plaintiff's entry was not such as to entitle him under 42 Vic. No. 19, s. 49, sub-sec. 5, to demand the delivery of the goods into lighters, nor such as to entitle him to have the goods delivered into lighters." There is no evidence of the property being in the plaintiff by indorsement. The bill of lading does not provide for delivery into lighters, and it would be absurd that a contract entered into in London between the captain and consignor, could be affected by the Act, our *Customs Regulation Act*, 42 Vic. No. 19. By s. 60 of that Act a captain's rights and remedies are reserved; and ss. 44-49 regulate the transshipment and landing of goods. The entry passed was this:—

"Dalton's Wharf,
To be lightered."

Under this the goods could not be landed except at Dalton's Wharf. Sub-sec. 5 of s. 49 of 42 Vic. No. 19, refers to the two cases only when goods are to be landed at another wharf, of

when the goods are to be transshipped. The form of entry prescribed under this sub-section was not used. A shipowner is not bound by s. 67 of the English *Merchant Shipping Act*, (*Carver's "Carriage by Sea,"* p. 457), and s. 49 of our *Customs Act* is similar to that section.

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Wise, Attorney-General, (*Want* with him) for the plaintiff, shewed cause. Though the indorsement by Brooks, Shoobridge & Co. is in blank, yet the Union Bank, by holding the bill of lading, gets the property in the goods: *Decachi v. Anglo-Egyptian Navigation Co.* (1); *Mauds and Pollock*, 345. Sec. 7 of the *Union Bank Act* does not direct how indorsements are to be made. Now that the bank is under the *Companies Act* the indorsement by the agent for the bank is good. The bill of lading is not inconsistent with the *Customs Regulation Act*, so the Act must prevail. The mode of execution of a contract is governed by the usages of the place of execution. No place for landing was named in the bill of lading, so the landing must be determined by subsequent arrangement. I submit that the indorsement by the Union Bank is perfectly good, being by an authorised officer; and it is not necessary that the wharf of delivery be mentioned in the entry.

Salomons, Q.C., in reply. If goods are placed on a customary wharf, and are in the power of the consignee to take them, the shipowner is not liable: *Barraclough v. Orient S.N. Co.* (2). Only under the Act can we be compelled to lighter. The declaration was framed under sub-sec. 5, s. 49, of the *Customs Regulation Act*, but the provisions of the section were not complied with. Under the *Bills of Lading Act*, 20 Vic. No. 13, only an indorsee to whom the property passes can bring an action. The bill was not indorsed specially; and further, it was not indorsed by the inspector of the Union Bank as required by s. 7 of 11 Vic., so that the plaintiff could not bring his action. An indorsee to have power to sue must be holder also, and if he indorses over the property passes: *Abbott on Shipping*, 12 Ed.

(1) L.R. 3 C.P. 190.

(2) 4 N.S.W.R. 75.

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276 ; *Smurthwaite v. Wilkins* (3). The *lex loci contractus* rules the obligations of parties : *P. & O. Co. v. Shand* (4).

On December 28 the judgment of the Court was delivered by OWEN, J. This is an action brought by R. Morison Stewart, claiming to be the owner, as indorsee of the bill of lading, of certain casks of cement, against George Doherty, the master of the ship *Argus*, for damage alleged to be done to such casks in consequence of the defendant discharging them on a wharf instead of on lighters, as required by the plaintiff. At the trial a verdict was returned for the plaintiff, with 69l. 18s. damages. There were four counts to the declaration, but the arguments before us turned only on the first count, the material portions of which are as follows :—“The said Brooks, Shoo bridge & Co. indorsed the said bill of lading to the plaintiff, to whom the property in the said goods thereby passed, and afterwards upon the arrival of the said ship in Sydney aforesaid the plaintiff duly required, and within a reasonable and proper time in that behalf, that the said goods should be delivered to him in lighters at the ship’s side in the said port of Sydney, and gave notice thereof to the defendant, and the delivery of the said goods was not prevented by any of the said matters so excepted and stipulated as aforesaid. And all conditions were fulfilled, and all things happened, and all time elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter alleged, yet the defendant did not deliver the said goods in the said like good order and condition to the plaintiff as agreed as aforesaid, and did not deliver the said goods into lighters as required as aforesaid, nor did he otherwise or at all deliver the said goods to the plaintiff ; but wrongfully placed the said goods upon a wharf without giving the plaintiff notice in that behalf, and without the knowledge or consent of the plaintiff, and kept the same there unprotected for a long time ; and by reason of the premises the said goods became wetted and damaged and greatly deteriorated in value.” To this count there were several pleas, but we need only consider the second and eighth. The second plea is as follows :—“The defendant, as to the said first, second, and third

counts, says that the said Brooks, Shoobridge & Co. did not indorse the said bill of lading to the plaintiff as alleged." The eighth plea is as follows: "As to the said first count, as to so much thereof as complains that the defendant did not deliver the said goods into lighters as alleged, the defendant says that the said goods were imported in the defendant's said ship from London beyond the seas, and the plaintiff not having made entry of the said goods within 24 hours after the report of the said ship, under the provisions of the Act 42 Vic. No. 19, the defendant being the master of the said ship made a provisional entry of the said goods, and the defendant says that the plaintiff did not at any time before the landing of the said goods make entry for the landing and warehousing thereof at any other wharf than that at which the said ship was discharging, nor for the transshipment thereof, nor did he demand the delivery thereof, as by the said Act provided." The bill of lading stipulates that the goods are to be delivered at the port of Sydney unto order; and as the jury have found on the third count that there is no usage or custom in the port of Sydney as to lightering, the plaintiff can only maintain his case by bringing it within the provisions of the Act 42 Vic. No. 19, sec. 49, sub-sec. 5. This sub-section is as follows:—"If at any time before the goods are landed or unshipped the importer has made entry for the landing and warehousing thereof at any other wharf or for the transshipment thereof than where the ship is discharging, and shall demand the delivery, the master or owner shall thereupon at once make such delivery into any vessel, barge, or lighter duly licensed by the collector, without landing them on such wharf, or state the time at which the goods can be delivered, otherwise the master or owner, before landing or unshipping such goods, shall give to the importer or to any warehouse-keeper named by him twelve hours' notice in writing that the goods are ready for delivery, and the master or owner shall, if he lands or unships the same without giving such notice, do so at his own risk and expense." This sub-section deals only with two cases: 1. Where the importer has made entry for some wharf other than that at which the ship is discharging; and 2. Where he has made entry for transshipment; and the lightering there referred to is only

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for the purpose of the safe transit of the goods from the ship to the wharf of entry or to another ship, so that the customs should not be defrauded. The section does not apply where the importer desires to have the goods delivered to him in lighters for his own convenience, or enable him to insist that his goods shall be placed in lighters instead of being landed on a wharf, except only where entry has been made for a wharf other than that at which the ship is discharging, or for transshipment. Now, it was admitted that the plaintiff in this case required the cement to be lightered in order to have it conveyed from the ship's side to Rose Bay for use at the Bondi Sewerage works. The entry that was made by the plaintiff contained only these words: "Dalton's Wharf, to be lightered." The ship *Argus* was then discharging at Dalton's Wharf. It was contended that these words were intended only to indicate the wharf at which the ship was lying, and that the wharf at which the plaintiff desired to land the goods might have been verbally explained to the customs officials. We cannot accept this construction. The word "entry" is defined in the Act to be "the customs document required for the landing or discharge of goods from any importing ship or warehouse," which clearly refers to a written document, and therefore an entry cannot be verbally made. In the case of *Beresford v. Montgomerie* (5), to which we were referred by the Attorney-General, the order obtained from the customs was for the delivery of the goods over side of the vessel into craft, to be landed at the plaintiff's private wharf. The entry, therefore, which was made for these casks of cement, does not fall within either of these two categories, and as that is so, the case is wholly outside the provisions of the 5th sub-section, and the plaintiff cannot maintain his action on the first count.

So far the Court is unanimous, and as our decision on this point disposes of the whole case, we might rest our judgment here; but as the questions raised by the second plea were also argued at length, and are of great importance, we think it right to express our opinions on the point, though unfortunately not unanimously. Mr. Justice *Deffell* and I consider that the plaintiff has failed to prove his right to sue as indorsee of the

bill of lading. Messrs. Brooks, Shoobridge & Co. indorsed the bill of lading to the Union Bank of Australia, Limited, Sydney, or order. The bank indorsed the bill of lading to the plaintiff "for the Union Bank, H. A. Gibbes." It was admitted that this Mr. Gibbes is only a clerk in the bank. Under the Act 11 Vic., s. 7 (the *Union Bank Act*), it is provided that all assignments made by or on behalf of the bank should be made and executed by the inspector for the time being of the bank. The indorsement to the bank having been a special indorsement to the bank or order, the indorsement of the bank in order to pass the property in the bill of lading is in effect an assignment, and as such must, in our opinion, be made by the inspector of the bank. We understand that the bank is now a limited company, under the *Companies Act*, the 79th section of which enables "any person acting under the authority of the company" to make, accept, or indorse any promissory note or bill of exchange. This provision confirms our view by limiting the power of such person to making, accepting, and indorsing the promissory notes and bills. It was argued that if this were so decided the business of the bank in reference to bills of lading would be seriously interfered with. We gather that it is very unusual for the bank to take an indorsement to the bank, or order; but where such indorsement is taken we think that this bank's indorsement, in order to pass the property in the bill of lading, must be by the inspector and not by a mere clerk of the bank. The rule, therefore, will be made absolute, and a verdict entered for the defendant.

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FAUCETT, J. With respect to the validity of the transfer of the bill of lading by the Union Bank, it is difficult to say that their Honours are not right in the opinion they have formed. At the same time I cannot agree with them on this point. Sec. 7 of 11 Vic., the *Union Bank of Australia Act*, says: "That all contracts, agreements, conveyances, leases, re-leases, mortgages, assignments, surrenders, covenants, receipts, and other documents, made or to be made, given or granted by, to, or on behalf of the said company, shall and may be made and executed and enforced by or to or against the inspector for the time being

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of the said bank, and the same shall be binding upon the said company and the capital stock thereof." The words thus cited are no doubt very comprehensive, and if the construction of their Honours be right, a receipt given by a clerk of the bank for money paid over the counter, either as a deposit or in payment of a debt or overdraft due to the bank, would be worthless if not signed by the inspector of the bank, who may be, in the discharge of his duties, not only in some distant part of this colony, but even in one of the other colonies, and who, at all events, cannot be at the same time at the different branch banks where the business of the bank is carried on. It is said that the construction of their Honours is supported by s. 79 of the *Companies Act*, 37 Vic. No. 19, the *Union Bank*, as we are told, being now a company of limited liability. That section gives effect to promissory notes or bills of exchange if made, accepted, or indorsed in the name of the company, or for or on account of the company by any person acting under the authority of the company; and because it does not also include bills of lading and give similar effect to them, it is considered that the omission shows the intention of the Legislature to exclude them. I would rather say that when passing that section the Legislature had not in their contemplation companies that dealt with bills of lading. If it had there is no intelligible reason for excluding the signing or indorsing of a bill of lading from its operation. The section, besides, is affirmative in its terms, not negative. I do not think it helps the present question one way or the other. It appears to me that s. 7 of the *Union Bank Act* was not intended to apply to the ordinary daily transactions of the business of the bank; otherwise it is difficult to see how a very large portion of its business could be carried on. It is said, however, that this is not an ordinary transaction of a bank; that although bills of lading are commonly deposited with banks as security, they are not usually specially indorsed to the bank, or order, as in the present instance. But I cannot draw that distinction. The bill of lading is deposited with the bank, subject to be called for at any moment, and if the bank is not prepared to give it up at once, it may render itself liable to an action. It cannot excuse itself by saying "our inspector is at

Bourke or Melbourne, and we cannot indorse it until he returns." I assume that the special indorsement to the bank is regular, although how it came there does not appear. The words, "Delivered to the Union Bank of Australia, Limited, or order," are put on by a printing stamp, nearly over the names of Brooks, Shoobridge & Co., the first indorsers, and can hardly have been put there by them. They were probably put there by some intermediate holder. I may add that, having read the evidence, I should have thought, apart from the points raised, that the verdict ought to have been for the defendant, but we are not called upon to decide that question.

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*Rule absolute to enter the verdict for
the defendant with costs.*

Attorneys for plaintiff: *Want, Johnson & Co.*

Attorneys for defendant: *Bradley & Son.*

MERCANTILE BANK v. BRODIE.

Nov. 25.

Practice—Judgment signed in vacation—Irregularity—Waiver—Delay—Insolvency Act (5 Vic. No. 17), ss. 54 & 56—Official assignee—Suggestion.

On January 20th, during vacation, A. issued a writ of summons against B., signed judgment by default, and, on January 28th, issued a writ of *fi. fa.* and levied on certain money then belonging to B., in the hands of a third person. On February 10th B., who had been arrested by A. on January 20th, under a writ of *ca. re.*, obtained his release by sequestration. On May 27th, B.'s official assignee obtained an order from a Judge in Chambers setting aside the judgment and execution, on the ground that the proceedings, having been taken in vacation, were irregular, and directing the money so recovered to be paid over to the official assignee.

Stephen J.
Deffell J.
and
Owen J.

Held (on appeal from that order), that the signing of the judgment was an irregularity, and not a nullity; but that the official assignee had waived such irregularity by delay.

Held, also (*Deffell, J., dubitante*), that the official assignee was entitled, under s. 54 of 5 Vic. No. 17, to make the application in Chambers, although he had not entered a suggestion under s. 56.

MOTION to make absolute a rule *nisi* to rescind an order of Sir G. Innes, J., made in Chambers on the 27th May, setting aside, on the application of the official assignee of the defendant's insolvent estate, a judgment signed in vacation by the plaintiffs

1887. against the defendant, and ordering the money recovered by the
MERCANTILE BANK OF BRODIE. plaintiffs under a writ of *fi. fa.* issued on that judgment to be paid to Mr. Stephen, the official assignee in the defendant's insolvent estate.

That order was made on an affidavit setting out the following facts :—On 18th January last the plaintiffs issued a writ specially indorsed, to recover 256*l.*, the amount of the defendant's overdraft at the Pyrmont branch of the plaintiff bank. The writ was served on the 20th January. The judgment by default having been signed, on the 29th January a writ of *fi. fa.* was issued. On the 19th January the plaintiffs obtained an order to hold the defendant to bail, and on the following day the defendant was lodged in Darlinghurst Gaol. On the 1st January the defendant had left Sydney by the steamship *Liguria*, of the Orient line, as a passenger for England, and placed in the hands of the purser 200*l.* in gold for safe custody. Whilst the *Liguria* was lying at Melbourne, the defendant, on the 8th January, was arrested on a charge of obtaining money by false pretences, and brought back to Sydney. The criminal charge having been heard the defendant was discharged from custody, but was re-arrested under the plaintiffs' writ of *ca. re.*, and lodged in Darlinghurst Gaol, as already stated, on January 20th. On February 10th he obtained his release, by sequestrating his estate. The money which he had deposited with the purser of the *Liguria* had been transmitted to the Sydney agent of the Orient line of steamers, and the plaintiffs, under a writ of *fi. fa.*, levied on it and obtained the sum of 197*l.* 10*s.*, being the sum of 200*l.* less charges and expenses, as duly shown by the return of the sheriff.

The ground of the application in Chambers was that on the above facts it appeared that the whole of the proceedings in the action subsequent to the writ of summons, having taken place in vacation, were therefore irregular.

This view was taken by the Judge in Chambers, who made the order now appealed from.

A rule *nisi* was granted to rescind this order on the grounds : 1. That the official assignee had no *locus standi*. 2. That the official assignee could not act without entering a suggestion. The rule further directed that the money, paid by the plaintiffs

into Court under the order appealed from, should remain in Court until the application should be finally disposed of.

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Salomons, Q.C. (O. B. Stephen with him), for the plaintiffs in support of the rule. The official assignee has no *locus standi*. He could have brought an action against the bank under ss. 6, 7, or 33 of 5 Vic. No. 17; but he cannot come in as a party to an action already commenced, without entering a suggestion on the record, as required by s. 56 of the same Act. If it were otherwise, the plaintiffs' rights might be seriously prejudiced.

[*Pring*. Mr. Justice *Innes*, in making the order, said that he would allow the suggestion to be entered *nunc pro tunc*.]

If they enter a suggestion on the record, we can traverse it. Secondly, the irregularity in the proceedings was waived by their delay. The defendant was insolvent on February 10th, and the application by his official assignee was not made till May 18th: *McDonald v. Gagan* (1).

Pring, for the official assignee, shewed cause. The point as to waiver was not raised before the Judge in Chambers, and is not one of the grounds of the rule; it therefore cannot be taken now. Even if it is properly taken at this stage, it must fail, as R. 25 of the *Regulæ Generales* for 1887 shew that these proceedings having been taken in vacation, the writ of *fi. fa.* was a nullity, which cannot be waived. S. 56 has no application to the present case. It enables the assignee "on entering a suggestion, to defend any suit or action pending against the insolvent," &c. How can it be said there was any action pending, when the whole proceedings were null and void? S. 54 was the section upon which Mr. Justice *Innes* decided. His Honour held that Brodie had a right to come before the Court and set aside the judgment, and therefore his official assignee had. [He also referred to *Pennington v. Manby* (2), and *Cocks v. Edwards* (3).]

Salomons, Q.C., in reply. If it is a nullity the official assignee must apply to enter a suggestion, as the writ would be pending.

(1) 5 N.S.W. L.R. 78.

(2) 1 S.C.R. 249.

(3) 2 Dowl. N.S. 55.

1887. If it is an irregularity, in the first place, he is not on the record ;
MERCANTILE secondly, it has been waived by delay. The rule must be made
BANK absolute with costs, as in *McDonald v. Gagan* (4) and *Orgill v.*
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BRODIE. *Bell* (5).

Pring referred to *McCrae v. Roper* (6), as showing that the Court would not grant costs where the unsuccessful party came to support the ruling of a Judge.

STEPHEN, J. There are two points upon which the Court are agreed. The first is that the signing of the judgment was not a nullity, but an irregularity. Then the next point is this: Assuming, for the sake of argument, that the official assignee had the right to apply to set aside these proceedings, it seems clear beyond all question that he was too late. I need only refer to one authority—*Weedon v. Garcia* (7). On that case I might, if so desired, found a decision that the assignee was perfectly entitled to take this proceeding ; but it is not necessary to do so. That case, however, and others of the same kind there cited, shew most unquestionably that if he was entitled he should have taken the objection within a reasonable time. In the present case the delay was from the 10th February until the 19th of May, and no one could doubt for a single moment that such delay was unreasonable. That is, so far, the judgment of the Court on the motion, and I only wish to add for myself that I do not think that the 56th section has anything whatever to do with this particular case. With regard to the 54th section, I am very much inclined to think that it does apply. I am of opinion that the proceedings were properly taken by the official assignee, and it seems quite clear to me that if the objection had been taken in good time by the party himself or the official assignee, an order for the re-payment of the money might have been made. With regard to costs, we agree that as the plaintiff was guilty of irregularity in the first instance, and the official assignee succeeded before Mr. Justice *Innes*, though he has failed here, the justice of the case will be

(4) 5 N.S.W. L.R. 78.

(6) 2 N.S.W. L.R. 232.

(5) 1 Exch. 468.

(7) 2 Dowling, N. S., 64.

answered by the costs of this particular motion being given against the official assignee, but not the costs in the Court below.

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DEFFELL, J. I concur generally, but I have considerable doubt whether the 54th section could be read without considering the 56th also.

OWEN, J. I concur.

*Application granted with costs, but
no costs of the motion in Cham-
bers; the money to be paid back
to plaintiffs.*

Attorneys for plaintiffs: *Oreagh & Williams.*

Attorneys for official assignee: *Stephen, Laurence & Jaques.*

STOKES v. HART AND OTHERS.

Contract—Sale of goods—Construction—"The quantity will, we expect, be about"
—Words of expectation and not contract.

Sept. 1.
Dec. 5.

S. wrote to H. on the 8th Dec., 1881, as follows: "We propose tendering for the supply of flour to the French Government, New Caledonia, for the flour required for 1882. Probably the deliveries will extend to February or March. *The quantity required will, we expect, be about 1100 to 1200 tons superfine, and 1500 to 1600 tons fine;*" and asked for their prices, which H. telegraphed, and then wrote: "We beg to confirm now this offer to you *for the New Caledonian contract*, and we trust the lowness of our quotations may lead to business. We make, however, one reservation, that we do not bind ourselves to our own manufacture of flour. As far as the fine or household is concerned, we do not make the required quantity in the year, &c. . . ." S. accepted H. & Co.'s terms, subject to the tender being successful. S. only obtained the contract for the fine flour; and informed H. & Co., who telegraphed: "We confirm contract for portions accepted by Noumea Government." The quantity, in fact, required by the Noumea Government was more than 1600 tons.

Faucett J.
Innes J.
and
Deffell J.

Held, that by their contract, H. & Co. were bound to supply the quantity of fine flour required by the French Government, the words "the quantity required will, we expect, be about 1500 to 1600 tons fine," being words of expectation only, and not words of contract.

The contract between the French Government and S. contained a condition reserving to the French Government the right to increase or diminish by 25 per cent. the quantity mentioned in the advertisement calling for tenders.

1887. *Held*, that such a condition in such a contract was not unreasonable, and H. & Co., though not directly bound by that or any other condition of the French contract, were bound, under their contract with S., to supply the additional quantity so required.

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Held, also, that H. & Co., having wrongfully refused to supply the full quantity of flour required, were liable to pay S. what S. had lost by demurrage.

The verdict for S., with 598*l.* 15*s.* damages for short delivery, and 75*l.* damages for demurrage, to stand. Rule discharged with costs.

NEW TRIAL MOTION.

This was an action brought by Charles Frederick Stokes, flour merchant at Newcastle, in New South Wales, against Charles Hawkins Todd Hart, Henry Keith Walters, and Charles Norton Todd, trading as John Hart & Co., flour merchants, &c., in Adelaide, South Australia, to recover damages for breach of a contract by which the defendants undertook to supply the plaintiff with such quantity of fine flour as might be required by the French Government at New Caledonia during the year 1882, at a certain price and of a certain quality, to be delivered at times mentioned in the agreement.

The contract between the parties was contained in a number of letters and telegrams referred to in the head-note, and set out at sufficient length for the purposes of this report in the judgment.

The French Government at New Caledonia had advertised for tenders for the supply of flour for the year 1882. The plaintiff, through one Devambe, a partner of his for New Caledonian business in Noumea, tendered, and his tender was accepted, for the supply of fine, or second quality flour. The plaintiff, who had, before the result of the tenders was known, written to the defendants for prices, subsequently contracted with the defendants to supply him with the flour which he would require to carry out his contract with the French Government.

The breaches alleged in the declaration were short delivery and that the flour was of inferior quality, and the plaintiff claimed damages also for demurrage.

At the trial, which took place at the Maitland Circuit Court in October, 1885, before Sir W. Manning, J., and a jury of four, a verdict was found for the plaintiff with damages 598*l.* 15*s.* for short delivery and 75*l.* for the demurrage; and leave was

reserved to the defendants to move the Full Court to enter the verdict for them altogether, or to reduce it by either of the above amounts.

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Accordingly, on November 5th, a rule *nisi* was granted on the grounds :—1. That the contract was for the supply of flour not exceeding 1600 tons. 2. That inasmuch as the defendants had supplied 1600 tons of flour, they had completely performed their contract and agreement. 3. That the defendants are not liable for the 75*l.* claimed as demurrage. 4. That the evidence shewed a complete performance by the defendants of the contract on their part.

The arguments on the rule were heard on August 18th, 1886, before Sir James Martin, C.J., Windeyer and Sir George Innes, JJ., who reserved judgment.

Darley, Q.C., and Rogers then argued for the defendants in support of the rule.

M. H. Stephen, Q.C., and Heydon, for the plaintiff, shewed cause.

On November 4th, 1886, before judgment was delivered, Sir James Martin died.

The case was now re-argued on September 1st, 1887, before

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Faucett, Innes, and Deffell, JJ.

Salomons, Q.C. (Rogers with him), for the defendant in support of the rule. The words in the plaintiff's letter—"the quantity required will, we expect, be about 1500 to 1600 tons"—are words of contract, and not mere words of expectancy. No reference having been made to the clause in the French contract reserving to the French Government the right to demand an additional 25 per cent. over and above the 1600 tons, plaintiff could not demand that additional quantity. The defendants contracted to supply the flour of the quality and description required to the amount of 1500 to 1600 tons. If it were understood by both parties that the flour to be supplied was the flour required by the French Government under their contract with the plaintiff, why did not the plaintiff send a copy of the French contract to the defendants, and so engraft it on to their contract with the defendants? What was the necessity of stating the

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particulars contained in the plaintiff's letter of 8th December as to the percentage of gluten? Why, also, did the plaintiff state 1500 to 1600 tons as the probable limit? All the defendants said was that if the plaintiff's tender was successful, they would consider themselves bound to supply the flour required to the extent of 1500 to 1600 tons: *Morris v. Levison* (1); *McConnell v. Murphy* (2). If the general words of a contract are at variance with the specific matter, the Court will look at that which is specifically stated. Secondly, as to the claim for demurrage, the damage is too remote; it did not arise out of the contract.

O. B. Stephen and *Heydon* shewed cause. The Court has simply to construe the contract as it appears by the correspondence. The use of the word "expect" shews that the words "will, we expect, be about 1500 to 1600 tons" are words of expectation, and not words of contract, like "say about," &c., which are often used to explain previous words. Here the subject matter of the contract required no explanation. The defendants entered into a sub-contract with the plaintiff to supply all the French Government might require under their contract with the plaintiff. In Adelaide, which is the metropolis of the flour trade, the terms of the French advertisement and the French contract must be taken to have been known. Suppose flour had gone down in price, instead of up, would not the defendants have insisted on the plaintiff receiving the whole amount required by the French Government? Words of expectation are not to be considered part of the contract unless the parties so intended: *Hayward v. Scougall* (3); *Gwillim v. Daniell* (4); *Leeming v. Snaith* (5); *McConnell v. Murphy* (6). In *McLay v. Perry* (7) "about 150 tons of iron" bought, turned out to be only 44 tons, and it was held that the plaintiff could not recover damages for short delivery.

[FAUCETT, J. If the plaintiff had made a contract with the French Government to supply all that Government might

(1) 1 C.P.D. 155; 45 L.J. C.P. 409.

(5) 16 Q.B. 275; 20 L.J. Q.B. 164.

(2) L.R. 5 P.C. 208.

(6) L.R. 5 P.C. 203.

(3) 2 Campb. 56.

(7) 44 L.T. N.S. 152.

(4) 2 C. M. & R. 61; 5 Tyr. 644.

require, without any specification as to quantity, would the defendants have been liable to supply say 100,000 tons instead of 1600 ?]

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The defendants had notice of the French contract all through, and could have seen a copy of it if they had so desired.

Heydon followed on the same side. He cited *Beauchamp v. Mitchell* (8); *Hunter v. Fry* (9); *Barker v. Windle* (10). As to demurrage he cited *Kennedy v. Panama Mail Company* (11).

Salomons in reply. Hart in his evidence taken on commission said he did not know the contents of the French contract. The evidence also shews that the plaintiff himself did not know of the clause in the French contract as to the supply of an additional quantity. He said that he only went by the quantity they had required in former years, having had two previous contracts without such a clause. Again, the plaintiff contracted with the defendants to supply any brands of "fine" flour, provided only it contained a certain percentage of gluten; whereas by the French contract it was stipulated that the flour should be the growth of Australia or New Zealand. The Court cannot hold that the clause in the French contract as to the 25 per cent., more or less, is incorporated into the contract between the plaintiff and the defendants.

Our. adv. vult.

On the 5th December the judgment of the Court was delivered by

Dec. 5.

FAUCETT, J. This is a motion to make absolute a rule *nisi* for a new trial. The action was for non-delivery of the full quantity of flour according to contract, and for demurrage. At the trial a verdict was returned for the plaintiff, with 598*l.* 15*s.* damages for the short delivery, and 75*l.* damages for the demurrage, leave being reserved to move to set aside the verdict and enter a verdict for the defendants. At the beginning of the arguments it was admitted that no question was raised as to the amount of

(8) *Newsp. Rep.* 1847.

(9) 2 B. & Ald. 421.

(10) 6 E. & B. 675.

(11) L.E. 2 Q.B. 590; 36 L.J. Q.B.

260; 8 B. & S. 571.

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damages, and in the rule *nisi* no objection is taken on that ground. And now the only question to be determined depends on the construction of the contract, which is contained in, and is to be made out from, letters and telegrams that passed between the plaintiff, who resides at Newcastle, in this colony, and the defendants, who reside at Adelaide, South Australia. The telegrams are generally fully recited in the subsequent letters. The first letter is from the plaintiff, who writes throughout as Stokes and Co., to the defendants, and is dated the 8th December, 1881. It is in the following terms :—

“We propose tendering for the supply of flour to the French Government, New Caledonia, for the flour required for 1882. Probably the deliveries will extend to February or March. The quantity required will, we expect, be about 1000 to 1200 tons superfine, and 1500 to 1600 tons fine. Deliveries for our last contract were made about every three months, in shipments of about 150 tons superfine, 250 tons fine.”

After mentioning the percentage of gluten required and the mode of payment, on which nothing turns, the letter concludes thus :—

“Will you be good enough to state at what price you will undertake to supply the quantity required by the French Government for the supply?”

This letter was replied to by the defendants, first by telegram, and subsequently by letter, dated 20th December, 1881. The letter is in the following terms :—

“Your letter of the 8th instant duly to hand, and we replied on the 20th instant by wire—‘Superfine, eleven pounds; fine, eight pounds fifteen; letter by next steamer.’ We beg to confirm now this offer to you for the New Caledonian contract, and we trust the lowness of our quotations may lead to business. We make, however, one reservation, that we do not bind ourselves to our own manufacture of flour. As far as the fine or household is concerned, we do not make the required quantity in the year, and therefore will have to supply partly other brands. There is, however, little probability of our shipping any other firm’s flour than our own, and the reservation is made to meet such mishaps as breakage of machinery, &c., as you say nothing about chartering, &c., &c. P.S.—Our offer remains open until the 3rd of January for acceptance by wire up to that date. Your acceptance, however, to be cancelled in the event of your firm or their agents not being the successful tenderers for the New Caledonian contract.”

By telegrams of December 30, 1881, and January 3, 1882, the plaintiff accepts this offer, on the understanding that the flour supplied by the defendants instead of their own should be of

approved brands, and as to the fine flour that it should be of the quality described. After these letters were written, there is some correspondence about the brands of any flour that may be delivered by the defendants instead of their own, and about the quality of the flour, on which nothing now turns. Eventually the plaintiff or his agents obtained only the contract for the fine or second quality of flour; and the defendants having been so informed consent to their agreement being limited to the contract so obtained. The words of their telegram (28th January, 1882) are:—

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“We confirm contract for portions accepted by Noumea Government.”

And so the agreement as to the second quality of flour is completed. There appears to have been subsequently an agreement to supply some superfine flour, with which, however, we have nothing to do. The question now is whether the contract contained in this correspondence, and acted upon to a large extent, is an agreement on the part of the defendants to supply the quantity of flour that may be required by the French Government for 1882, now limited to the second quality of flour; or whether the quantity of flour to be supplied by the defendants is limited to about 1500 or 1600 tons—in other words, whether the words in the plaintiff's letter of 8th December, 1881, “the quantity required will, we expect, be about 1500 or 1600 tons,” are words of mere expectation only or words of contract. The quantity, in fact, required by the French Government has been more than 1600 tons. It is, no doubt, a governing rule in the construction of contracts that, if possible, a substantial meaning must be given to every part of it. But we must say that it is difficult in the present case to give effect to this rule. When the letters constituting the agreement were written it was not known what quantity of flour would be required by the French Government. It might considerably exceed or considerably fall short of about 1500 or 1600 tons. But the plaintiff, after telling the defendants that he proposes tendering for the supply of flour that may be required, and mentioning what he expects that quantity to be, asks them at what price they will undertake to supply the quantity required for the supply. He does not ask at

1887. what price they would supply about 1500 or 1600 tons. He merely asks at what price they will supply the quantity required by the French Government for the supply. No doubt he asks the question with reference to his statement that he expects the quantity required will be about 1500 or 1600 tons. But on considering the whole tenor of the plaintiff's letter, it appears to us that the proper and natural construction to be put upon it is that the plaintiff, when informing the defendants that he proposed to tender for the supply of flour required by the French Government, and asking the price at which they would undertake to supply the quantity so required, mentioned the quantity which he expected would be required, merely to give them such information as he possessed, and with the view of assisting them in considering the prices at which they would undertake to supply what might be required, but without any intention to bind himself, one way or the other, to the quantity so mentioned. In fact he was not in a position to bind himself to any actual quantity, and, therefore, uses a form of expression which we think shews that he did not intend to do so, but that he rather intended to guard himself against doing so. There is throughout no suggestion of fraud or untrue representation on the part of the plaintiff.

The cases present some difficulty. Several were cited such as *Thomas v. Olarke* (12), *Hunter v. Fry* (13), and *Barker v. Windle* (14), in which a statement of the capacity of a ship in the beginning of a charter-party was held to be mere description, and not to affect the contract to load a full and complete cargo. We pass over these cases as having a very slight bearing, if any, upon the construction of the contract in the present case. But in *Hayward v. Scougall* (15), the contract was to sell all the hemp that may be loaded by certain vessels then at Riga, not exceeding 300 tons, by the supercargo of the vessels or the agents of the concern; and Lord *Ellenborough* held that the bankers said in substance, "We will sell you all that our agents at Riga ship for us, to the amount of 300 tons. If they send us so much you shall have it; if they send us none we have sold none to you."

(12) 2 Stark. 450.

(14) 6 E. & B. 675.

(13) 2 B. & Ald. 421.

(15) 2 Camp. 56.

Here the words "not exceeding 300 tons" are clearly a limit to the quantity. In *Gwillim v. Daniel* (16), a contract by the defendant to sell all the naphtha he might make for and during the term of two years, say from 1000 to 1200 gallons per month, was held to be a contract to sell only what he might make—not exceeding 1000 to 1200 gallons—what in fact his works might reasonably make during the term. Lord Abinger, C.B., construed the word "say" as meaning mainly that in all probability the quantity of naphtha produced will amount to 1000 or 1200 gallons. "The contract," his Lordship says, "in reality was this, 'I undertake to sell to you all the naphtha that I may make in my works during the next two years.' That it may probably amount in quantity to 1000 or 1200 gallons per month, is no part of the contract." Again, in *M'Connell v. Murphy* (17), where there was a contract to sell all the spars manufactured by Richard M'Connell, averaging 16in. by culler's measurements in Quebec. The above spars will be out of the lot manufactured by Jean Brousseau; it was held that the words, "say about 600 red-pine spars," were words of expectation only, and not of warranty. In the course of the judgment of the Privy Council, it is said, "the words used are, 'say about 600 red-pine spars.' These words have different meanings, according to the context in different contracts, but looking at the way in which the words are used here, 'say about 600 red-pine spars,' the words—'say about' appear to be thrown in for the purpose of guarding the vendor against being supposed to have made an absolute contract as to quantity. There is not merely the word 'about,' which in itself creates an uncertainty, but 'say about.'" And the case of *Gwillim v. Daniel* is referred to, and, we may say, followed. Although the facts of these latter cases may not be altogether the same as those of the present case, still we think that the principle to be deduced from them must govern the present case. That principle appears to be this—that where, in transactions of the kind now under consideration—say in contracts with respect to the sale of goods or the supply of goods—there is a clear and distinct contract made out, which is the governing and dominant part of the transaction, such clear and distinct contract will not

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(16) 2 C.M. & R. 61.

(17) L.R. 5 P.C. 203.

1887. be affected one way or the other by such uncertain words as those
 STOKES now in question, and such words will be treated as words of
 v. expectation only. This principle is in no way affected by the
 HART. decision in *Leeming v. Snaith* (18), where the words "say not
 Faucett J. less than 100 packs" were held to be not merely words of
 expectation, but words of contract; the distinction being, as
 pointed out in *McConnell v. Murphy*, that the words "say not less
 than 100 packs" are negative words defining a minimum quantity,
 just as in *Hayward v. Scougall*, the words "not exceeding 300
 tons," defined the maximum quantity. Neither is the principle
 affected by the decision in *Morris v. Levison* (19), as might at
 first sight appear to be the case. In that case a charter-
 party provided that the ship should proceed to the port of
 loading, and there load a full and complete cargo of iron ore,
 not exceeding what she might reasonably stow, say about 1100
 tons. The Court, applying the governing rule for the construction
 of contracts—that, if possible, a substantial meaning must be
 given to every part of the contract—held that the words "say
 about 1100 tons" were not words of expectation, but were words
 of contract. "The reasonable meaning," says *Brett, J.*, "seems
 to be that the shipowner undertakes, if the ship is of much
 greater capacity than 1100 tons, to accept a cargo of about 1100
 tons as equivalent to a full cargo, and thus effect is given to the
 words 'say about,' &c., but also effect is given to the words 'full
 and complete cargo;' for if the ship holds less than 1100 tons,
 then the charterer's obligation is fulfilled by loading up to the
 actual capacity." This construction, however reasonable, is, it
 must be seen, entirely in favour of the shipowner and against
 the charterers; for, if the ship were of less capacity, what
 remedy would the latter have if he had about 1100 tons at the
 port of loading ready to load? It may be said that he should
 have provided in the contract that the shipowner should accept
 the quantity mentioned, so as to make the contract on this point
 mutual. The decision, however, seems to rest to some extent on
 the surrounding circumstances, as mentioned by *Brett, J.*, in the
 beginning of his judgment, one of which is that the shipowner
 undertakes to have the ship at the port of loading ready to load

by a specific time, and that the capacity of the ship ought to be in his knowledge. However, the case was considered not an easy one; and the Court showed no intention of reversing or questioning the former decisions, to which we have referred.

After a close consideration of these cases it appears to us that the words now in question are, in a stronger degree than the words in any of the cases referred to, mere words of expectation, and not words of contract. All the surrounding circumstances, and the whole purport of the plaintiff's letter of the 8th December, in our opinion show that the governing object of the plaintiff in writing that letter was to ascertain whether, and on what terms, the defendants would undertake to supply the flour required by the French Government, the quantity of which was then uncertain, and that the words "the quantity will, we expect, be about 1500 or 1600 tons," were not intended to warrant that the quantity would be limited either way to that amount; in other words, these words are words of expectation only. The statements of the defendants in their letter of the 24th December that, as far as the fine or household is concerned, they do not make the required quantity in the year and therefore will have to supply partly other brands, does not, we think, affect the question. It may be, and we think probably, is, the case that the words "required quantity" in that letter referred to the 1500 or 1600 tons expected to be required. But in the early part of the letter they confirm their offer by telegram "for the New Caledonia contract," showing that the contract with the French Government was the ruling or governing idea with them as well as with the plaintiff. And although it may be admitted that the word "contract" used in some of the letters or telegrams of the defendants, may have included a reference to the quantity expected to be required, yet we think that the letter of the 30th May, 1882, although it cannot affect the construction of the contract, supports the view we take. In that letter the defendants express a wish to know on what terms the plaintiff's friends would wish to free them from the present contract. This wish is again expressed more strongly in their letter of 3rd June, 1882. Those letters surely show that the clear and ruling idea with the defendants was that their agree-

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ment was in respect of the French contract. Why otherwise should they desire its cancellation? No doubt the contract was found by this time not to be so profitable as they expected, and therefore they were willing to make terms for its cancellation. We by no means, however, desire to suggest that this was the reason they refused to complete the contract according to the construction put upon it by the plaintiff. The defendants, after having supplied 1280 tons, contend in their letter of 30th August, 1882, and in a telegram of about the same date, that they are not bound by their contract to supply more than 1600 tons, which they say is the maximum requirement of the New Caledonian contract. This contention the plaintiff disputes. But it is clear that the contention between the parties at this late period can have no effect upon the construction of the contract, which is contained in, and must be determined by, the letters and telegrams that passed between the parties in December and January.

The only remaining question on this part of the case is, whether the defendants should be affected by that condition of the French contract which reserves to the French Government the right to increase or diminish to an extent not exceeding 25 per cent. the quantity mentioned in the advertisement calling for tenders, and which appears to have been a term in the contract of the plaintiff or his agents with the French Government. This condition, it appears, was also in the advertisement calling for tenders. As to this, we cannot say that such a condition in such a contract is at all unreasonable. And if the French Government, acting upon this condition, required the contractors to supply an additional quantity not exceeding 25 per cent., it appears to us that the defendants, although not directly bound by that or any other condition of the French contract, would, under their contract with the plaintiff, be bound to supply the additional quantity so required. This condition unfortunately appears to have been the entire cause of the dispute between these parties. On the question as to the construction of the contract, therefore, we are of opinion that the plaintiff must succeed; and accordingly that the verdict for the plaintiff as to damages for short delivery must stand.

As to the question of demurrage, that, in our opinion, depends on the former questions. The defendants have, as we think, wrongly refused to supply the full quantity of flour they were bound to supply according to their contract. The plaintiff has consequently lost by demurrage. So the jury have found; and they have assessed the damages at 75*l*. That part of the verdict also must stand. The rule will therefore be discharged, and with costs.

Rule discharged with costs.

Attorneys for plaintiff: *Ellis & Makinson* for *H. J. Brown* (Newcastle).

Attorneys for defendants: *Allen & Allen*.

[On December 16th, the defendants obtained leave to appeal to the Privy Council.]

PROUDFOOT v. PROCTOR.

Nov. 11 & 14.

Penalty—Constitution Act (18 and 19 Vic. cap. 54), ss. 28 and 29—Parliamentary disqualifications—Contract or agreement “for or on account of the public service.”

*Innes J.
Deffell, J.
and
Owen J.*

The plaintiff sued under s. 29 of the *Constitution Act* (18 and 19 Vic. cap. 54), to recover a penalty of 500*l*. from the defendant, for that while he was a member of the Legislative Assembly of New South Wales, &c., he did, by himself, or by some person or persons in trust for him, &c., undertake, execute, hold, and enjoy a certain contract “for or on account of the public service,” within s. 28 of the same Act. It appeared that the defendant became one of the guarantors of a contractor with the Government, and took an assignment of the contract by way of security. He did not receive any of the moneys payable on the contract, nor did he obtain the consent of the Government to the assignment, as required by a clause of the contract.

Held, that defendant by taking the assignment did not become a contractor with the Government, “for or on account of the public service,” so as to render himself liable to the statutory penalty.

Logan and Proudfoot were partners in the contract for the construction of No. 3 section of the Illawarra railway. Proudfoot became insolvent, his insolvency dissolving the partnership, and Logan wishing to carry on the contract sought Proctor's assistance to get him a guarantee with the bank. Proctor became one of Logan's guarantors, and wishing to protect himself took an assignment of the contract from Logan. At

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the time of taking the assignment Proctor was a member of the Legislative Assembly of New South Wales, and Proudfoot sought to recover the penalty of 500*l.* under sec. 29 of the *Constitution Act* (18 and 19 Vic. cap. 54), for that Proctor, being a member of the Legislative Assembly, had entered into a contract with the Government for or on account of the public service, within the meaning of s. 28 of that Act (1).

DECLARATION:—For that before the accruing of the cause of action hereinafter declared on, the defendant was elected a member of the Legislative Assembly of New South Wales, and had taken the oath and his seat as such member as aforesaid, and that, while such member as aforesaid, did, by himself or by some person or persons in trust for the defendant, and for his own use and benefit and on his account, undertake, execute, hold, and enjoy a certain contract or agreement for or on account of the public service, to wit, the contract for the construction of number 3 section of the Illawarra railway, and while so interested in the said contract, did continue to hold his seat in the said Assembly, and did vote as a member of the said Assembly, whereby the defendant became liable to forfeit and forfeited the sum of five hundred pounds to the plaintiff, who sues the defendant for the same in this action under the statute in that behalf, and the plaintiff claims 500*l.*

PLEAS:—1. Not guilty. 2. That the defendant did not by himself or by some person or persons in trust for the defendant, and for his own use and benefit, and on his account, undertake, execute, hold, and enjoy a certain contract or agreement for or on account of the public service, to wit, the contract for the construction of number 3 section of the Illawarra railway, as alleged. 3. That the defendant did not sit and vote as a member of the Legislative Assembly as alleged.

Issue was joined on these pleas, and at the trial before *Faucett, J.*, on December 16th, 1886, the jury returned a verdict for the plaintiff for the amount claimed.

A rule *nisi* for a new trial was granted on the following grounds:—1. That his Honour was wrong in telling the jury that, if they found that a certain document, in which one Logan

(1) S. 28 is set out in the judgment of Sir G. Innes, J., *post*.

purported to assign to the defendant a contract which had been entered into by the said Logan with the Commissioner for Railways, was intended to take effect as a deed of assignment (though only held as a security) from the date of its execution by the said Logan, they must find for the plaintiff. 2. That his Honour ought to have told the jury that the defendant must have been bound under obligation and responsible to the Government in order to bring him within the objects and provisions of sections 28 and 29 of 18 and 19 Vic. cap. 54.

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Foster, Q.C. (*Ralston* with him), for the defendant. Sections 28 and 29 of our *Constitution Act* (18 and 19 Vic. cap. 54) are substantially the same as two sections of 22 Geo. III. cap. 45, which statute Sir Erskine May says was passed to prevent the Government having influence over members of Parliament. The contract between Logan and Proctor was a private contract: *Thompson v. Pearse* (2). By s. 18 of the original contract it could not be assigned without the consent of the Commissioner for Railways, which Proctor never obtained, and so was not a contractor with the Government. Proctor never "enjoyed" the contract, but was an agent for Logan. A sub-contractor cannot come within the Act: *Rogers on Elections*, 198, 199.

Pilcher (*Cohen* with him), shewed cause. The Legislature intended to put the members of the Legislative Assembly outside the possibility of being corrupted. Sec. 28 of the *Constitution Act* says, "Any person who shall directly or indirectly . . . enjoy . . . any contract . . . shall be incapable . . . of sitting or voting as a member of the . . . Legislative Assembly."

[SIR G. INNES, J. This may include the creditor of a contractor.]

The assignment contains—1st, a bill of sale over the plant; 2ndly, an assignment of the contract; 3rdly, an irrevocable power of attorney. There is no difference between this assignment and a purchase of the contract.

1887. *Foster*, in reply. There is no suggestion that Proctor got the
PROUDFOOT money for himself.

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SIR GEORGE INNES, J. We are all of opinion that in this case the defendant has not exposed himself to the penalties that are sought to be recovered in the action. It is necessary, in my opinion, in order to the success of an action of this kind that the defendant must have entered into a contract or agreement "for or on account of the public service," and I do not think that the defendant here has, within the meaning of section 28, entered into any such contract or agreement. Every contract must necessarily have two parties to it, and in the contracts contemplated by the section the Government, it seems to me, must be one of the parties. A contract no doubt has been entered into here which has reference to a contract which has been entered into by Mr. Logan "for or on account of the public service," and a contract has been entered into by Proctor, but not a contract, in my opinion, with the Government. In other words, he himself has not entered into a contract or agreement "for or on account of the public service" within the meaning of section 28. The case depends, of course, upon the construction of sections 28 and 29 of our *Constitution Act* (18 and 19 Vic., chapter 54), and it is necessary to look somewhat closely at the wording of those two sections. Now section 28 deals with two classes of persons who may become exposed to the penalties which are imposed under certain circumstances by section 29. The first class of persons that section 28 deals with are persons who are not members of Parliament, and with reference to them the section says:—"Any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him or for his use or benefit, or on his account, undertake, execute, hold or enjoy in the whole or in part any contract or agreement for or on account of the public service, shall be incapable of being summoned or elected, or of sitting or voting as a member of the Legislative Council or Legislative Assembly during the time he shall execute, hold or enjoy any such contract or any part or share thereof, or any benefit or emolument arising from

the same." Well, now it seems to me, in looking at that part of the section in connection with the second branch of it, which deals with persons who at the time they enter into the contract are members of the Council or of the Assembly, that although the words are not the same, still even persons in the first branch of the section must be persons who, either personally or by someone on their behalf, have entered into a contract and who are really contractors—and that it is not enough that they are (as the argument of Mr. *Pilcher* would go the length of contending) persons who were indirectly interested in a contract, the interest being so remote and so indirect that it really would include a creditor of a contractor with the Government—a person who, by reason of a set of circumstances (even the financial position of the contractor, his debtor) might not be able to obtain payment of his debt from the contractor except by means of the moneys which that contractor would obtain by virtue of his contract. In that sense such a person would no doubt have an interest in the contract—an interest which, practically, would touch that person, and which, he having contracted with the contractor, and being a creditor of the contractor, would touch him somewhat nearly. But I do not think it would include any such person as that with regard to liability to penalties under section 29. I think the words must mean some person who (as his Honour in the Court below seems to have thought) then held a contract. Well, the second branch of section 28 runs thus: "If any person being a member of such Council or Assembly, shall enter into any such contract or agreement, or having entered into it shall continue to hold it, his seat shall be declared by the said Legislative Council or Legislative Assembly, as the case may require, to be void; and thereupon the same shall become and be void accordingly." There are two distinct classes—persons who, while not members of Parliament become contractors are, while they continue to be contractors, incapable of being elected; and, in the second branch (the one we are now considering, and the one under which the present defendant comes), persons who being members of the Council or the Assembly enter into any "such" contracts or agreements, and having entered into them shall sit or vote. I have stated that

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1887. I think that in both branches it is necessary that the person be
PROUDFOOT a contractor. In this particular case it is not, perhaps, absolutely
v. necessary to hold that, for what we have to deal with here is the
PROCTOR. position of a person who, being a member of the Council or
Innes J. the Assembly, comes under the second branch of section 28.
The defendant was such a person. The first branch of this
section merely deals with the question of the incapacity of
being elected. The second branch deals with the conse-
quences of entering into such a contract—viz., that the seat
shall become void. Then, with regard to the penalty, the con-
cluding part of section 29 is as follows :—"If any person under
any of the disqualifications mentioned in the last preceeding sec-
tion shall, whilst so disqualified, presume to sit or vote as a
member of the said Council or Assembly, such person shall forfeit
the sum of 500*l*." In this case it seems to me necessary to
establish, that Mr. Proctor, being a member of the Legislature,
entered into a contract, "for or on account of the public
service," and, having entered into that, not merely that his seat
became void immediately, but that after having entered into
it he presumed to sit or vote as a member. The declaration in
this case is somewhat cunningly framed, because, though it does
allege that the defendant was a member of the Legislative
Assembly, it does not go on to say that he entered into the con-
tract or agreement, and having entered into it, presumed to sit
or vote as a member, but it immediately harks back to the earlier
part of the section, and says, "The defendant was elected a
member of the Legislative Assembly of New South Wales and
had taken the oath and his seat as such member, and while such
member as aforesaid he, by himself or by some person or per-
sons in trust for the defendant, and for his own use and benefit
and on his account, did undertake, execute, hold and enjoy a
certain contract or agreement for or on account of the public
service—to wit, the contract for the construction of No. 3 section
of the Illawarra railway, and while so interested in the said con-
tract did continue to hold his seat in the said Assembly." It seems
to me that the declaration ought strictly to have been framed on
the words in the concluding branch of section 28, but I do not
say in any way that the declaration is demurrable, for it does

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allege that the defendant was a contractor—that is, the holder of a contract, “for or on account of the public service.” Well, now, I do not think that the defendant has exposed himself to the penalties imposed by section 29. It is true that he has taken an assignment of this contract. What is the contract? The contract is one certainly not entered into originally by Proctor, or by any person in trust for him or on his behalf, but entered into apparently at a time when Proctor was an absolute stranger to the whole transaction. There is no suggestion that he was in any way in contemplation at the time of the original entering into of the contract; there is no suggestion whatever that Logan or the original contractors, Logan and Proudfoot, the present plaintiff, in any way originally entered into this contract in trust for Proctor, or on Proctor’s behalf, for Proctor was an absolute stranger to it. As far as we can see it was not in any way contemplated that Proctor was, either then, or at any future time, to become interested in any way in the contract. What takes place afterwards? Proudfoot in some way or another ceases to be a party to the contract. We need not stop to inquire the legal consequences of his insolvency; the admitted consequence seems to have been that Proudfoot ceased to be a party to the contract, and that Logan continued to be the sole contractor with the Government. Well, some time subsequent to that Logan found himself in financial difficulties, or at all events requiring financial assistance, and applies to the defendant to procure him that assistance, and ultimately the defendant himself becomes one of three guarantors to the bank for the necessary advances, and takes as security for those advances an assignment of this contract, of which assignment admittedly he could not have made practical use until default had been made on Logan’s part in some of the stipulations in that contract of assignment. In the original contract there is a clause, to which our attention has been properly directed, that that contract was not to be assigned without the consent of the Government, one of the contracting parties to that contract. Now, it is admitted that the consent of the Government was never asked, never obtained. No notice of any kind was given to the Government of this

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contract or so-called assignment between Logan and Proctor, and there can be no question whatever that no privity ever arose in any way or shape between Proctor and the Government. Proctor had no rights as against the Government. The Government, in the then set of circumstances, had no rights as against Proctor. There was no mutual consideration, nor was there any mutual obligation so far as Proctor and the Government were concerned. But then it is argued that—inasmuch as for a valuable consideration Logan had assigned to Proctor the contract itself, and had given him large powers—from that time forth Logan held the contract simply in trust for Proctor. Well, I am of opinion that that argument cannot be supported. The only way in which such a doctrine could be maintained, or such contention could succeed, would be by the importation into the transaction of the equitable doctrine that, under those circumstances, Logan would be declared by the Court of Equity to be a trustee for Proctor. A trustee of what? A trustee of the moneys he would receive and of the benefits he would receive under that contract, but in no way exonerating Logan from his obligations to the Government, in no way introducing against the will of the Government Proctor in the place of Logan as between the Government and the other party to the contract, and the argument cannot go farther than to say that if the interference of the Court of Equity were invoked the Court of Equity would for certain purposes declare Logan to be a trustee for Proctor. This, it must be remembered, is a penal statute. This is a proceeding, though no doubt in the nature of what used to be spoken of as a *qui tam* action—and I am not by any means sure it is not so now, but it is not necessary to consider the details of the case—this is an action of a penal character. It is necessary, as Mr. Foster has put before us, before the defendant in an action of this kind can be mulct in this prescribed penalty, for the jury and the Court before which he is tried to be satisfied he has committed the offence which is charged against him, and by reason of which he is exposed to this fine. It is a well-known and well-understood rule that penal statutes must be strictly construed, and it does not seem to me to be competent for us in any way to invoke some equitable doctrine between

trustees and *cestuis que trustent* for the purposes of making out a penal action. In one sense, no doubt, as I have already said, the defendant has become interested in this contract, but for the reasons which I have given I do not think that he can be looked upon as having become either directly or indirectly, either by himself or by any person whatsoever, in trust for him or for his use or benefit or on his account, a contractor with the Government for or on account of the public service, and still less can it be contended that originally he, being a member of the Assembly, entered into the contract; nor do I think, as I have said, that the effect of the transaction between him and Logan can be looked upon as amounting to this—that he, while a member of the Assembly, though not a party to the original contract, subsequently entered into that contract. For these reasons I think the rule must be made absolute and a new trial must be directed. Of course, as the Court is unanimous in this holding, it is not likely the case will be tried a second time.

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DEFFELL and OWEN, JJ., concurred.

*Rule absolute with costs; costs
of the former trial to abide the
event of the new trial.*

Attorneys for the plaintiff: *Levy & Hemsley.*

Defendant in person.

[NOTE.—On December 2 leave was granted to the plaintiff to appeal to the Privy Council. See next case.]

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Dec. 2.

Privy Council appeal—Amount—Action for 500l. penalty.

Stephen J.
Deffell J.
and
Owen J.

Where a penalty of 500l. was recovered in an action for breaches of the provisions of ss. 28 & 29 of the *Constitution Act* (18 & 19 Vic. c. 54) the Court granted leave to appeal to the Privy Council.

Cohen, for the plaintiff, moved for leave to appeal to the Privy Council against the decision of the Supreme Court granting a new trial. (See preceding case.) The action was to recover a penalty under ss. 28 & 29 of the *Constitution Act* (18 & 19 Vic. c. 54), and the jury returned a verdict for 500l., the full amount of the penalty.

Ralston, for the defendant, opposed. In the first place, it was not a claim respecting a civil right. Secondly, the plaintiff, if successful, would only be entitled to half the penalty, half going to the Crown. Proudfoot's interest, therefore, being only 250l., he cannot be allowed to appeal: *Morse v. A.S.N. Co.* (1).

Cohen. This is a "claim, demand or question, to or respecting property or any civil right, amounting to or of the value of 500l. sterling," within the meaning of the Orders in Council of 24th June, 1851 (*Pilch. Prac.*, par. 1411). The informer is the possessor of a civil right in respect of a judgment to the amount of 500l.

STEPHEN, J. Surely you cannot contend that this is a civil right.

Cohen. At any rate it comes within the words "judgment decree, order or sentence, in respect of a sum or matter above the value of 500l.," inasmuch as interest is payable on the verdict from its date: *Owston v. Bank of N.S. Wales* (2).

The Court thereupon granted leave to appeal on the usual terms.

MILLER v. HALL.

1887.

Dec. 9.

*Costs—Certificate under s. 101 of the District Courts Act (22 Vic. No. 18)—
Detinue of deeds and breach of contract—Verdict—Amount recovered.*

*Faucett J.
Stephen J.
and
Deffell J*

In an action brought in the Supreme Court for detinue of title deeds and breach of contract to return them, a verdict was given for the plaintiff, with 25*l.* damages for breach of contract, and the return of the deeds or their value, which the jury assessed at 279*l.* The deeds were returned. The defendant asked the Judge to hold that the case was within s. 101 of 22 Vic. No. 18, and that the plaintiff, having recovered a sum "not exceeding 30*l.*," must obtain a Judge's certificate before he would be entitled to his costs.

Held (on reference to the Full Court), that, the deeds having been returned, the verdict only stood for 25*l.*, and at most 1*s.* nominal damages, and that therefore the case was within the statute; so that the plaintiff was not entitled to costs without the Judge's certificate.

THIS was a question of costs referred by *Faucett, J.*, to the Full Court, under the following circumstances:—The plaintiff sued the defendant for detaining certain title deeds relating to land of the plaintiff, and, upon a second count, for breach of a contract to deliver up the deeds; and the plaintiff claimed "a return of the said title deeds or their value, and 100*l.* for their detention, and under the residue of the declaration, 500*l.*" To this declaration the defendant pleaded, among other things, that the deeds were deposited by the plaintiff with the defendant as a security for the payment of certain moneys advanced by the defendant to the plaintiff and certain charges due to Mr. C. H. Fitzhardinge, solicitor, for work done by him for the plaintiff in respect of the deeds at their request, and that the said C. H. Fitzhardinge detained the deeds as in lien and security for his charges.

The case was heard at the Dubbo Circuit Court before *Faucett, J.*, and a jury of four. The *postea* was as follows:—"Verdict for the plaintiff, damages 25*l.* Value of deeds, 279*l.*"

The deeds were returned, and question of costs was reserved until after the hearing of a motion for a new trial. The motion having been struck out on the ground that the rule had been taken out too late, the question of costs, which had been referred to the Full Court by *Faucett, J.*, came on for argument.

1897. *Salomons, Q.C., and Heydon for the defendant.* Here the
MILLER plaintiff having recovered "a sum not exceeding 30*l.*," cannot get
v. his costs unless the Judge certifies: *District Courts Act* (22 Vic.
HALL. No. 18), ss. 100 & 101.

Gibson, for the plaintiff. It is out of the Judge's hands altogether, as the plaintiff "recovered" 279*l.*, in addition to the 25*l.* damages. If the deeds had been destroyed or lost he would have recovered the whole amount of 304*l.* Therefore the action could not have been brought in the District Court. Secondly, the plaintiff having recovered damages beyond nominal damages is entitled to the costs of the action: Ch. Archb. (12th ed.), p. 1378; *Pickering v. Truste* (1); *Phillips v. Hayward* (2); *Earl v. Holderness* (3).

Salomons, in reply. Their proper course was to pay the seven guineas and sue Mr. Fitzhardinge in the District Court to recover the money, on the ground that they had been coerced into paying it.

[STEPHEN, J. The Judge has to certify immediately after verdict and before it can be known whether the deeds will be delivered up. Suppose the defendant had brought the deeds into Court at the last moment, would he not have had to pay the costs of the action?]

I rely upon the words of the statute, within the meaning of which the plaintiff has only recovered "a sum not exceeding 30*l.*"

FAUCETT, J. This is a singular question, and it is the first time it has ever been raised. It appears that the defendant advanced money to the plaintiff on the security of some deeds relating to land which the plaintiff owned. Instead of paying the entire amount due upon the deeds, it was agreed that one of the deeds should be given up on payment of a portion of the money. I have no doubt that if the defendant had demanded the deeds from Mr. Fitzhardinge, the latter would have been bound to give them up. But when the plaintiff presented his

(1) 7 T.R. 53.

(2) 3 Dowl. 362.

(3) 4 Bing. 462; 1 M. & P. 254.

letter from the defendant to Mr. Fitzhardinge, the latter said, "I have a lien against you for an old debt of seven guineas, which is now barred by the Statute of Limitations. I shall hold the deeds until the debt is paid." It was pointed out at the trial that the simpler course would have been to have made an application to Mr. Fitzhardinge or to have paid the seven guineas. The proper course would have been to have gone to a Judge in Chambers, when the matter could have been decided. Instead of that a Supreme Court action is brought. It was tried before me on circuit; two counsel were engaged, and great expense was incurred. A verdict was given for 25*l.* on the count for breach of contract; and on the count for detainue, as a mere legal consequence of the verdict on the other count, the plaintiff recovered nominal damages. I also told the jury to assess the value of the deeds. The jury said:—"We value the land at 275*l.*" And then in answer to a question from me they said that was the value they put upon the deeds. The question is whether, under those circumstances, as the Judge who tried the case, I had power to certify for costs; whether, that is to say, a sum of more than 30*l.* had been "recovered" by the plaintiff. If a sum of 30*l.* is recovered, the Judge has no discretion. Of course, I could not prevent the plaintiff from applying to the Court. The Judge is not bound to certify at the time of the trial. Sometimes the Judge takes time to consider. Sometimes he withholds his decision until an application is made to the Supreme Court to set aside the verdict. I must say that, as the matter now stands, it appears to me that the verdict stands for 25*l.* and 1*s.* That is a sum under 30*l.* It is clear that beyond that no sum was recovered. We must take the law as we find it, and, if the statute is clear, we are not bound to look at the moral aspect of the case. Suppose the verdict had been for 100*l.*, the Judge would have no need to certify for costs; but the Supreme Court might set the verdict aside, or by reducing it to 20*l.*, bring the case within the statute. That is the position in which I was placed; and that is why I reserved the question of costs. Here, it seems to me, looking at the words of the statute—"recovered by verdict, judgment by default, or otherwise"—that a verdict has not been "recovered" for any sum

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exceeding 30l. If the defendant had not delivered up the deed, the alternative finding would have come into effect. Where, under similar circumstances, there had been a wilful detainer, a Judge would ordinarily certify. Where the words of a statute are clear and express, we have no right to extend them in any direction that morality, or any other motive, may suggest.

STEPHEN, J. I think it safer on the whole to abide by the statute. The verdict is for *a* + *b*. In the event *b* is given up. Therefore *a* alone is recovered, and, the sum being less than 30l., the plaintiff is not entitled to costs without the Judge's certificate. The safety-valve is that the Judge has power to certify if he thinks fit.

DEFFELL, J. I concur. The verdict being in the alternative, the plaintiff did not recover an amount exceeding 30l.

Judgment for the defendant, without costs.

Attorney for plaintiff: *W. T. A. Shorter*. Attorney for defendant: *M. A. H. Fitzhardinge*, for *O. H. Fitzhardinge* (Dubbo).

UHDE v. ASCHE.

Landlord and tenant—Eviction—Expulsion of sub-tenant—Re-entry by tenant—Action for rent.

Nov. 1.

The C.J.
Innes J.
and
Stephen J.

Where a sub-tenant is evicted and the tenant resumes possession (as, for instance, by taking the keys from the sub-tenant, and not immediately handing them over to the landlord), that puts an end to the eviction; and the landlord's right to rent is only suspended during the continuance of the eviction.

To constitute an eviction there must be some act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

Whether in this case there was sufficient evidence of an eviction, *Quære*.

DISTRICT COURT APPEAL.

The plaintiff, Louis Uhde, proprietor of the Grand Hotel, Wynyard-square, sued Thomas Asche, proprietor of the Royal Hotel, George-street, for a month's rent of three rooms in a private house adjoining the former hotel, which he had let to the defendant for twelve months, from the 3rd of January, 1887,

at the rate of 5*l.* per week, payable monthly. The particulars were:—To one month's rent at 5*l.* per week from 23rd May to 20th June, 1887.

The facts, which are fully stated in the judgment of his Honour the *Chief Justice*, are shortly these:—The rooms were taken by Asche, the defendant, for his nephew, a doctor, who never occupied them. On the 23rd May, Asche sub-let to one Michel for a week, and received 5*l.* from him. Michel proposed to use the rooms as an oyster-saloon, &c., but during the week he was excluded by Uhde from the house under circumstances held by Mr. District Court Judge *Wilkinson* to amount to an eviction.

The learned Judge found as follows:—"I find a verdict for the defendant. I find that a tenancy for one week at all events was created between Asche and Michel from the 23rd to 30th May; and the rent was paid, and possession taken by the sub-tenant; and that he was evicted by Uhde. I find that no objection by Uhde to Michel was communicated to, or known by, either Asche or Michel until after Michel paid the 5*l.* to Asche. I find that the evidence and the probabilities to be deduced from the circumstances shew that Uhde intended to deprive Michel of the benefit of the enjoyment of the demised premises, so that he should not continue to hold them as he was entitled to hold them; and that he acted as he did act for that purpose, as he (Uhde) said himself in his evidence:—'It is not likely that I would have an oysterman for a tenant.' See *Burn v. Phelps* (1), and *Upton v. Townsend* (2). I find that as it was the act of the landlord there could be no apportionment of the monthly rent sued for. See *Grogan v. Slapp* (3)."

A rule *nisi* was granted on the grounds—1. That there was no evidence to justify the finding that there was an eviction. 2. That upon the evidence and defence raised, the verdict should have passed for the plaintiff.

Cohen, for the plaintiff, in support of the rule, read the evidence.

The Court called upon

Bruce Smith for the defendant. The plaintiff distinctly

(1) *Stark. N.P.* 94, cited in *I Wms.* (2) 25 *L.J. C.P.* 44.

Saund. 298.

(3) 3 *S.C.R.* 231.

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intimated to Michel that he did not wish him to stop, and locked him out; the giving notice to an under tenant to quit, if acted on, is an eviction, and, therefore, the defendant is not liable in this action for rent: *Burn v. Phelps* (4). It was for the Judge, as a jurymen, to say whether the landlord had acted so as to deprive the tenant of the enjoyment of the premises: *Upton v. Townend* (5). This is not an eviction by title paramount, in which case the rent could be apportioned; but it is a tortious eviction by the landlord, which disentitles him from recovering any rent at all: *Grogan v. Slapp* (6). It is a question of fact, not of law, and the Court will not interfere with the finding of the Judge. [He also cited *Hall v. Burgess* (7).]

The CHIEF JUSTICE. We are all of opinion that there must be a new trial in this case; and though it may be that we are not all agreed upon one point, the difference of opinion will not affect the result. I am of opinion that there is absolutely no evidence of an eviction. It appears that Uhde let Asche three rooms of a house for a year, two rooms being downstairs and the other up-stairs. These rooms were let to the defendant for the purpose of being occupied by his nephew, a doctor, two as consulting rooms, and one as a sleeping-room if the doctor required it. It appeared that the defendant did not require these rooms afterwards for the use of the doctor, and he seems to have gone to a fishmonger, and asked him if he could find anyone to take these rooms, there being no clause in the lease against sub-letting. It appears also, according to the evidence of the defendant, that when he applied to this fishmonger the latter produced Michel, who was a dealer in oysters. Mr. Gannon and Asche came together some time after the 23rd May, though why Mr. Gannon was brought upon the scene at that stage it is hard to understand; and the plaintiff is immediately told that Michel is brought there for the purpose of being a sub-tenant, and that it was the intention of Michel to open an oyster shop in one of

(4) 1 Stark. 94. See *Henderson v. Mears*, 28 L.J. Q.B. 305.

(5) 17 C.B. 30; 25 L.J. C.P. 49.

(6) 3 S.C.R. 231.

(7) 5 B. & C. 332; 4 L.J. K.B. (o.s.) 172.

these rooms. The plaintiff naturally enough shewed his disinclination to this, whereupon Gannon said, "There is no stipulation in your lease against it, and whether he opens an oyster saloon or not, you will have to submit to it." The plaintiff submitted to what he considered to be inevitable, and Asche brings Michel down and gets the locks put in order, and Michel appears afterwards and locks the doors. At the end of the week he comes down and does not seem in any very great hurry; but he uses language to Mrs. Uhde which he afterwards expressed his regret for having used. He tells Mr. Uhde that he intends to open an oyster saloon, and that he will have the place open all night for girls, &c. That shewed pretty clearly what sort of a man he was. Mrs. Uhde expresses a disinclination to permit this, and Michel goes away and comes back in the evening, and finds the hall door, as one would naturally have supposed, shut. He does not appear to have attempted to go in through the hotel, or to have knocked or rung at the hall door, but goes away. Two or three days elapse and Michel comes back again—at what time he does not say—and finding the hall door still shut, and a notice on the door stating that persons wanting anything should go round, he pushes against the door but finds it firm. He does not appear to have knocked or rung, and this is an end of Mr. Michel, who immediately went to his landlord, Mr. Asche, and handed the keys to him. Mr. Asche takes no steps until more than a week after the month's rent is due, and on the 30th June he writes to plaintiff, saying that the keys are then at his disposal. This is the first intimation that Mr. Uhde has that the defendant intends to give up the place. It appears to me that under the circumstances there was no evidence of an eviction. The learned Judge below found that there was, and seeing that one of their Honours, at any rate, thinks there was some evidence, however slight, I express my own opinion with diffidence.

In the case of *Burn v. Phelps* (8), cited by Mr. Bruce Smith, there was an actual notice to quit given to the sub-tenant, who gave up possession, and the premises remained unoccupied for a whole year, when the tenant re-let them; it was then held

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that the landlord could not recover from his tenant the rent of the unoccupied premises for the time they were so unoccupied, as his conduct in giving notice to quit amounted to an eviction. He also cited *Upton v. Townend* and *Upton v. Greenless* (9). Both cases were argued, and there was very considerable doubt in the minds of the learned Judges as to the true legal meaning of the word "eviction," and after hearing argument the *Lord Chief Justice* laid down what appears to me to be a very safe definition of eviction.

In *Upton v. Townend* (10), *Jervis, C.J.*, said, "The Court are desirous of having a correct legal definition of eviction." And again at p. 64 (after hearing argument) he said:—"It is extremely difficult at the present day to define with technical accuracy what is an eviction." From that it is clear that there was considerable doubt in the minds of the Judges. The learned *Lord Chief Justice* continues:—"The word eviction, from *evincere*—to evict, &c., dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law . . . The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." It must, therefore, be some act of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

Now, I fail to see, after reading the evidence carefully, anything here of a grave and permanent character done by the landlord with an intention to deprive the tenant of the demised premises. No doubt if the tenant had knocked at the door and intimated his intention to enter by that door, and the landlord had told him he could not enter, that would be evidence of an intention to deprive the tenant of the permanent enjoyment of these rooms, and would have been a distinct act by the

(9) 17 C.B. 30; 25 L.J. C.P. 49.

(10) 17 C.B. at p. 51; and see 25 L. J. C.P. 44.

landlord similar to giving notice to quit. I see no evidence of any act done by Michel which shewed an intention on his part to occupy the rooms. It appears to me that Michel being brought on the scene was a mere threat. It was hoped by those who arranged this plan that, Michel making himself particularly obnoxious, Uhde would be easily induced to relieve Asche of an onerous lease.

However, whether there was evidence of an eviction or not, Asche kept possession of the place until the 30th June; and having kept possession of the place until that time—that is, after the supposed eviction took place—the case must go down for a new trial, inasmuch as an eviction by a landlord only suspends the rent during eviction. The law is clearly laid down in *Morrison v. Chadwick* (11), by *Coltman, J.*, in delivering the judgment of the Court (at p. 283):—"An eviction by a landlord of his tenant from a part of the premises, creates a suspension of the entire rent during the continuance of the eviction until the tenant resumes possession." In this case the defendant has done something equivalent to re-entering and resuming possession, and not until the month's rent has fallen due and a new month commenced does he tender the keys. On these grounds I think the case must go down for a new trial, when the defendant may be able to give evidence of the eviction and strengthen his position.

SIR G. INNES, J. I am also of opinion that the case must go down for a new trial, but on the ground that there was a determination of the eviction, as Asche retained the keys for the remainder of the period of the sub-tenancy. That is the ground on which I think the learned Judge below fell into an error. But with regard to the question whether there was an eviction or not, with all due deference to his Honour the *Chief Justice*, I am disposed to agree with the decision of the Judge below that there was some evidence of an eviction. The case of *Upton v. Townsend* (12), seems to me to contain a fair summary of the law and to give a good definition of the term eviction. I only differ from his Honour in thinking that there was some evidence of an

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(11) 7 C.B. 266.

(12) 17 C.B. 50; 25 L.J. C.P. 44.

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eviction. I might have found the other way had I been a juryman in the case, but I think there was some evidence, though it may have been slight, to justify the verdict. The plaintiff seems to have been blowing hot and cold. Mr. Gannon was right in saying that so long as the business was a lawful one, the plaintiff had imposed no restriction as to the kind of business to be carried on. Of course I can understand that it would have been different if the rooms had been let as ordinary furnished apartments. No doubt it was expected that they would be occupied by a relation of the defendant; and though it appears that Uhde accepted the oysterman as a tenant, it was also proved that both Mr. and Mrs. Uhde said they would not allow him to occupy the rooms, and that high words were exchanged. I think, therefore, that looking at all the facts there was some evidence of something done by the landlord to justify the finding of the Judge below that the plaintiff acted with the intention of depriving the tenant of his right.

STEPHEN, J. As the case must go down for a new trial, I do not think I am called upon to give a decision upon the point on which their Honours differ. If there is any evidence of an eviction it is very slight. If we were to decide in the defendant's favour, we should be carrying the principle further than any of the reported cases.

*Rule absolute with costs. Costs
of first trial to abide the event.*

Attorney for plaintiff : Coonan.

Attorney for defendant : F. Gannon.

GORMAN v. NORTON AND ANOTHER.

Contract—Guarantee—"We undertake on behalf of L. to pay"—Settlement of case by solicitor—Intention of parties—Surrounding circumstances—Personal liability.

1887.

Dec. 5.

Stephen J.
Deffell, J.
and
Owen J.

G. having commenced an action against L., and being about to apply for a writ of *ca. re.* for his arrest, his solicitors received the following letter from the defendants, L.'s solicitors:—"In this case we have seen the defendant, who is about to leave the colony to-morrow, and will probably not return. As it will be impossible in the meantime to examine him *de bene esse*, we propose to settle this case by referring it at once to some member of the Bar, or to a merchant to arbitrate upon, and *we undertake, on behalf of the defendant*, to pay any sum that may be awarded against him in case he is found to blame or responsible for the accident to your client. It will not be necessary to have any agreement of arbitration, and an order of reference can be subsequently drawn *nunc pro tunc*. The advantage of this course will be that the arbitrator may go on board the ship before she leaves the port, and inspect the *locus in quo*. Your early attention will oblige.—Yours truly, Norton and Smith." Accordingly, G., the plaintiff, abandoned all further proceedings for arresting L., who left the colony without giving security. The action was discontinued; and an arbitrator awarded the plaintiff the sum of 36*l.*, which the defendants refused to pay.

Held, that looking at the intention of the parties and the surrounding circumstances, when the letter was written, the defendants were personally liable to pay the sum awarded. .

DECLARATION.—Patrick John Gorman sues James Norton and Robert Smith, lately carrying on business under the style of Norton and Smith, for that before the making of the agreement hereinafter alleged, one James Luck was the captain and master of a certain ship called the "Kenmure Castle," which was then lying at a wharf in the harbour of Port Jackson, and the plaintiff, whilst he was properly and in the necessary discharge of his duty as a tide waiter on board the said ship, was, through the negligence of the said James Luck, severely injured in his (the plaintiff's) body, and suffered damages to an amount much exceeding the sum of twenty pounds, and the plaintiff then had a good cause of action against the said James Luck for the said damages so caused by the said negligence, and had commenced an action in this Honourable Court against the said James Luck, to recover the said damages, and the said James Luck, at the time of the commencement of the said action, was temporarily

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in Port Jackson with his said ship, and was not a resident in the colony of New South Wales, and had no property in the said colony, and was about shortly to leave the said port and colony with his said ship; and the said James Luck did not then expect, and it was, in fact, improbable that the said James Luck would return to the said port and colony, and the plaintiff then had good cause to have the said James Luck arrested upon a writ of *capias ad respondendum*, and to be held in arrest until the said James Luck should give bail and security for the damages claimed in the said action, and for the costs of the said action; and it was probable that if the said James Luck left the said colony without giving such security the claim of the plaintiff would be entirely defeated and he would be unable to recover any portion thereof, and the plaintiff had accordingly instructed his solicitors, Messieurs Slattery and Heydon, to make due application for an order for the issue of a writ of *capias ad respondendum* for the arrest of the said James Luck as aforesaid, and the plaintiff's said solicitors had begun proceedings and had prepared certain papers and affidavits for the purpose of making due and proper application for the said writ, of all which facts the defendants had notice at the time of the making of the promise and agreement hereinafter alleged. And the plaintiff says that the defendants being then the solicitors and agents of the said James Luck, and having notice of the facts aforesaid, then proposed to the solicitors and agents of the plaintiff, the said Messieurs Slattery and Heydon, that in consideration that the plaintiff, by his said solicitors, would not take proceedings to arrest the said James Luck, and would allow the said James Luck to leave the colony of New South Wales without giving security as aforesaid, and would discontinue the said action, and would submit the said claim to the arbitration of some person, to be agreed upon as arbitrator by the said Messieurs Slattery and Heydon and the defendants, they the defendants would become personally responsible for the payment of any damages and costs that might, in the said arbitration, be awarded against the said James Luck, and in pursuance of the said proposal the agreement embodied in the following letter written by the defendants to the said Messieurs Slattery and Heydon, was

entered into between the plaintiff through his said solicitors and agents and the defendants, that is to say :—

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Messrs. Slattery & Heydon,
Solicitors,
Pitt-street.

Luck ats. Gorman.

DEAR SIRS,—In this case we have seen the defendant, who is about to leave the colony to-morrow, and will probably not return.

As it will be impossible in the meantime to examine him *de bene esse*, we propose to settle this case by referring it at once to some member of the Bar, or to a merchant to arbitrate upon, and we undertake, *on behalf of the defendant*, to pay any sum that may be awarded against him in case he is found to blame, or responsible for the accident to your client.

It will be better to have a single arbitrator, and with the view of deciding at once upon the party, we propose the following names, viz., &c.

It will not be necessary to have any agreement of arbitration, and an order of reference can be subsequently drawn *nunc pro tunc*. The advantage of this course will be that the arbitrator may go on board the ship before she leaves the port, and inspect the *locus in quo*.

Your early attention will oblige,

Yours truly,

NORTON & SMITH.

And the plaintiff thereupon in pursuance of the said agreement abandoned all further proceeding for arresting the said James Luck, and allowed the said James Luck to leave the said colony without giving any security as aforesaid, and discontinued the said action, and afterwards the said claim was duly and in accordance with the said agreement submitted to the arbitration of an arbitrator duly agreed upon and appointed by the said Messieurs Slattery & Heydon and the defendants, and an award was had, and the said arbitrator duly found that the said James Luck was responsible for the injuries suffered by the plaintiff,

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and duly awarded against the said James Luck that he should pay the plaintiff the sum of thirty-six pounds, and the whole of the proceedings under the said award were carried out duly and properly and in accordance with the said agreement, and the plaintiff has duly demanded from the defendants the payment to him of the said sum of thirty-six pounds, and all conditions have been performed and all times have elapsed and all things have happened necessary to entitle the plaintiff to payment of the said award by the defendants and to maintain this action for the breach of the said agreement hereinafter alleged, yet the defendants have not paid and have absolutely refused to pay the said award or any part thereof. And the plaintiff claims thirty-six pounds.

PLEA.—And for a second plea, the defendants say that the alleged proposal, promise, and agreement was a special promise to answer for the debt, default, and miscarriage of another person, and that, except so far as appears by the said letter, which was dated and made on the twenty-fifth day of August in the year of our Lord one thousand eight hundred and eighty-one, the said agreement was not nor was any memorandum or note thereof in writing signed by the defendants or by any other person thereunto by them lawfully authorised.

DEMURRER to the second plea. The points marked for argument being :—1. That the said proposal, promise, and agreement was not a special promise to answer for the debt, default, or miscarriage of another person. 2. That if it were such a special promise the said letter of the 25th August, 1881, was a sufficient memorandum or note thereof in writing signed by the defendants. 3. That the second plea confesses but does not avoid the cause of action set out in the declaration.

JOINDER in demurrer. The defendants also notified that it was their intention upon the argument of the demurrer to object to the sufficiency of the declaration upon the following grounds: 1. That the agreement and undertaking contained in the letter set out in the declaration were made by the defendants on behalf of the said James Luck, and were not binding on the defendants

personally. 2. That the declaration does not allege that the said James Luck made default in paying the amount of the said award.

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Salomons, Q.C., and Heydon, for the plaintiff, in support of the demurrer. By the language of their letter, the defendants have made themselves personally responsible: *Burrell v. Jones* (1); *Hall v. Ashurst* (2). The principle is to whom was it intended that the plaintiff should look for payment. The agreement was between the plaintiff and the defendants, not between the plaintiff and Luck. It does not matter that the defendants said, "We undertake on behalf of the defendant." Those words were used in *Appleton v. Binks* (3), and it was held that the person so covenanting was personally liable. *Downman v. Williams* (4) shews that we are right in setting out the surrounding circumstances.

[STEPHEN, J. *Bainbridge v. Wade* (5) is a much later authority to shew that the Court can look at the special circumstances surrounding the making of a guarantee in order to arrive at its meaning.]

C. B. Stephen. No case can be found in which a person contracting on behalf of another has been held to be personally liable. The test is whether it appears on the face of the instrument that he is an agent only: *Alexander v. Sizer* (6); *Lindus v. Melrose* (7); *Healey v. Story* (8).

[OWEN, J. Do not the cases shew that the intention of the parties is to be ascertained from the document itself and the surrounding circumstances? If so, does the mere form of words matter, so long as you can clearly ascertain the intention?]

I shall contend that they do. It does not mention that no one but the defendants would be liable. In their letter the defendants say:—"We propose to settle the case," &c. There are signs of

(1) 3 B. & Ald. 47.

(2) 1 Cr. & M. 714.

(3) 5 East. 143.

(4) 7 Q.B. 103; 14 L.J. Q.B. 226.

(5) 16 Q.B. 89; 20 L.J. 37.

(6) L.R. 4 Ex. 102.

(7) 2 H. & N. 293; 3 H. & N. 177;

27 L.J. Ex. 326.

(8) 3 Exch. 3.

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hurry throughout. The arbitration might have been held the same day.

[STEPHEN, J. My impression is that the letter means that as Luck had to go away at once, the defendants ask that he shall be allowed to go, saying that they will be looked to instead of him.]

The words "on Behalf of" relieve the defendants from liability: *Gadd v. Houghton* (9); *Ogden v. Hall* (10); *Ryan v. Dangar* (11); *Lewis v. Nicholson* (12); *Downman v. Williams* (13). In the last case the words were "I undertake on behalf of E. & C. to pay," &c., which are the very words used in the present case. The letter states that "the order of reference can be subsequently drawn *nunc pro tunc*;" it cannot therefore be assumed that there was any intention of making this arrangement, or having the award, *after* Luck's departure. That is not alleged in the declaration, and nothing is to be assumed that is not in the declaration.

[STEPHEN, J. It does seem to me that any one reading this letter would think that the defendants intended to be personally responsible.]

The letter was written with a view to settling the whole matter at once before Luck left.

[OWEN, J. I understand, then, that your argument is that the agreement was to abide by an informal award.]

Yes. There was time to have everything done in a day. In *Hall v. Ashurst* (14), the defendant was held liable on the second letter which he wrote, in which the words "on behalf of," &c., were omitted. The rule is stated in *Roscoe* (14th Ed.) p. 92:—"Regularly on a written contract by A., on behalf of B., B. should be sued, and not A." *Allaway v. Duncan* (15) is a strong case in my favour. There an attorney wrote respecting an overdue bill not paid by his client, "if," &c., "I shall be pre-

(9) 1 Exch. Div. 357; 46 L.J. Ex. 71. (12) 18 Q.B. 503; 21 L.J. Q.B. 311.

(10) 40 L.T. 751.

(13) 7 Q.B. 103; 14 L.J. Q.B. 226.

(11) 6 N.S.W. L.R. 87.

(14) 1 Cr. & M. 714.

(15) 16 L.T. 264.

pared to take it up," and it was held that he was not personally liable. The present letter must be construed according to the strict meaning of the words, without regard to the possible consequences of Luck's departure.

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Salomons, in reply. The plea, to which we have demurred, has not been referred to by Mr. *Stephen*. If the letter is a guarantee, then we have a memorandum in writing signed by Norton and Smith. It is not signed by them on account of anybody else. The second plea raised the defence that the letter having been written on the 25th August, 1881, and therefore before the Act 46 Vic. No. 4, the consideration must appear in writing. But here it is admitted that there was a good consideration.

[*C. B. Stephen*. I have never argued this point. If we are personally liable, it is a guarantee, and the plea is good. I have said nothing about the plea.]

I contend that the defendants are liable whether it is a guarantee or not. The meaning of the plea is that there is no consideration in the letter, and that it was written before the passing of the Act 46 Vic. No. 4. Suppose the meaning is that it is a warranty? They say in this plea that it was not in writing. But there is a memorandum in writing. That is admitted. The declaration may be read as based upon either a guaranty or a pecuniary liability. Either view will support it.

[*STEPHEN, J.* You will succeed if it is a guarantee. But they say it is neither, because they only made a promise for Luck, *i.e.*, that it was Luck's promise, and that there is no responsibility in them at all, as guarantors or otherwise.]

The defendants are primarily liable in this letter. It is admitted that it is not a contract to be answerable for the debt or default of another. That is why they did not demur to the declaration. The words are not "we undertake that it shall be paid by Luck;" but "we undertake on behalf of Luck to pay." If the signature had been followed by the words "on behalf of Luck," or "on account of Luck," or "as agents for Luck," we should have been out of Court.

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[STEPHEN, J. What do you say to *Ryan v. Dangar* (16) ?]

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That decision is against all the cases. *Hough v. Manzanos* (17) is a later case than any cited on the other side, and a direct decision in our favour.

STEPHEN, J. This is undoubtedly a case *sui generis*, and one which is not likely in any way to be drawn into a precedent. It seems to be unnecessary to reserve our judgment for the purpose of going through all the cases which have been cited, cases so contradictory that an attempt to reconcile them would be a much more difficult task for me than it was for a much abler man, the late Sir James *Martin*, who stated his inability to do so. There is, however, one general principle running through them by which we may be safely guided, and that is, that where parties sign an agreement in their own names they are liable upon that agreement, unless it appears on the face of the document that they are only contracting as agents. This document having been signed by the defendants, *Norton and Smith*, the question is whether there is, on the face of it, anything to exclude the doctrine of personal liability. We are all of opinion that there is not. I need not recapitulate the facts. The letter does not in any way profess to make an agreement on behalf of Luck. The only part of this letter which could possibly be construed to fix a liability on Luck is in the second paragraph, which contains the words—"We undertake on behalf of the defendant to pay any sum that may be awarded." We have to see what the person to whom the letter was written understood by it. I am unable to come to any other conclusion than that *Norton and Smith* by this letter made themselves personally liable, whatever may have been their intention at the time. The plaintiff had applied for a writ of *ca. re.* against Luck, and would therefore have been entitled to have the security of his person or a bail-bond. He was about (as the letter states) to leave the colony the very next day, and would probably not return, so that the plaintiff would have no practical remedy against him. What advantage was to be obtained by plaintiff's foregoing the security which the *capias*

(16) 6 N.S.W.R.

(17) 4 Ex. Div. 104 ; 48 L.J. Ex. 398 ;
27 W.R. 586.

would afford him? Luck's liability on an award against him would place the plaintiff in no better position. Luck might decline payment, and the plaintiff would have to arrest him again, that is on the supposition that he was still in the colony. Is it not, then, fair to conclude that when the defendants say, "we undertake to pay, &c., on his behalf," the arrangement was that they were to be personally liable. The contention of Mr. *Salomons* seems right, viz., that the plaintiff would have but the alternative remedy of an action against Luck on the award or on this agreement. Is that the position in which the parties meant to place themselves? When *Norton and Smith* said "we undertake to pay" they did not make a contract that the defendant would pay. For these reasons I am of opinion that our judgment should be for the plaintiff.

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DEFFELL, J. I am of the same opinion. One part of the second paragraph of the defendants' letter shews the construction to be put upon it. They say, "We propose to settle this case, &c." What does that mean? It must mean something more than that they are merely acting on behalf of Luck.

OWEN, J. It is difficult to decide between the cases to which we have been referred. The ordinary law of principal and agent cannot be applied here. We must find out what the intention of the parties was when the arrangement was made. Therefore, although the words may be the same as are sometimes employed in ordinary contracts between principals and agents, the surrounding circumstances may impose a liability which would not ordinarily be incurred. The same words may receive a different construction. We have the defendants signing this document simply as *Norton and Smith*, solicitors, and it is said that the words "on behalf of the defendant," appearing in the body of the letter, take away their liability to pay. These words must, however, be construed by the light of the surrounding circumstances, which must be gathered from the letter itself. These were the surrounding circumstances of which the parties had notice at the time when that letter was written. That being so, the defendants requested that the proceedings should be allowed to drop; and undertook to pay the

1887. plaintiff if the award should be against Luck. The under-
 GORMAN standing must have been that if the award was against Luck,
 v. the defendants would bind themselves to pay any sum that Luck
 NORTON. might be adjudged to pay. I do not think the words "on
 Owen J. behalf of" Luck take away any liability which the present
 defendants would have otherwise incurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Slattery & Heydon.*

Oct. 24.

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The C.J.
 Faucett J.
 and
 Innes J.

Negligence—Pleading—"Negligently drove and managed"—Inherent vice of horse—Evidence for jury.

The declaration alleged that the defendant, by his servant, so "negligently and unskilfully drove and managed" a certain cart and horses, and it appeared at the trial that one of the defendant's horses was to the knowledge of the defendant addicted to shying, and, by shying, caused the accident.

Held (Innes, J., dissentiente), that the plaintiff could not rely upon such evidence as shewing negligent "driving" or "management;" but the declaration ought to have contained a count for "negligently using a shying horse," which might have been added upon amendment at the trial.

Per Innes, J. That it was at all events arguable whether the using of a horse known by the driver to be addicted to shying, though it may not have been negligent "driving," was or was not negligent and improper "management" of the cart and horses.

MOTION NISI for new trial.

ACTION FOR NEGLIGENCE.

DECLARATION:—For that, &c., the defendant, by G.D., his servant, so negligently and unskilfully drove and managed a cart and horses along a highway that the same were forced and driven against the cart and horse of the plaintiff, whereby, &c.
 Plea:—Not guilty.

The plaintiff's case was that he was driving quietly along the Randwick-road towards Sydney, when he saw the defendant's van, with two horses driven tandem, coming along at a gallop.

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Seeing that a collision was probable, the plaintiff pulled up at the side of the road with one wheel on the footpath ; but the defendant's wheel struck the plaintiff's off-side step, and the plaintiff was thrown out and hurt. The collision took place about 300 yards from the junction of the Randwick and Moore Park roads, where the road was wide enough for three vehicles abreast.

For the defence, G.D., the driver, and another man who was in the van, swore that it was not being driven at a rapid pace ; that the leading horse was only cantering ; that they had to pass a buggy going in the same direction, and, just at that moment, a tram came along and startled the horses ; that the leader shied ; and that the collision was only a slight one, and would not have occurred if the plaintiff had not been in the middle of the road.

In cross-examination, the defendant's driver admitted that the leading horse had shied on previous occasions at passing trams.

The *Chief Justice*, who tried the case, directed the jury that if the horse suddenly swerved from fright the defendant was not liable ; and further told them that the only evidence of negligence was that of the plaintiff to the effect that the defendant's driver did not appear to be endeavouring to pull up the horses.

Bruce Smith, for the plaintiff, contended that the admission of the horses being within the knowledge of defendant's driver addicted to shying was evidence of negligence on the part of defendant in using such a horse in a much-frequented thoroughfare.

The *Chief Justice* held that even if that were so the declaration would need to be differently framed so as to charge the defendant with the negligent use of a shying horse.

Verdict for the defendant.

A rule *nisi* was moved for on the following grounds :—1. Fresh evidence since trial. 2. That his Honour was in error in directing the jury that if the defendant's horse suddenly swerved

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from fright, the defendant was not liable. 3. That his Honour was in error in directing the jury that the only evidence of negligence was that given by one of the plaintiff's witnesses, to the effect that the defendant's driver did not appear to be pulling up the horses. 4. Against evidence.

Bruce Smith, for the plaintiff, in support of the motion. First, the admission of the defendant's driver that he knew that the leading horse was addicted to shying at trams, and did, on the occasion of the accident, shy at a tram and become unmanageable, was evidence to go to the jury of "negligent management." Therefore his Honour the *Chief Justice* ought not to have told the jury that the only evidence of negligence was that set out in the third ground. Drury, the defendant's driver, admitted in cross-examination that the leading mare was addicted to shying at trams; that a tram on this occasion was "coming round the corner;" and that "the leading mare shied." In *Crofts v. Waterhouse* (1), an action against a coach proprietor for negligence and improper conduct of his servants, it was held that a jury might from the mere fact of the coachman having gone off the road presume negligence, and on that presumption found a verdict for the plaintiff. *Best*, C.J., said at p. 321, that "a coachman must be provided with steady horses," and added, "If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled and they are answerable for any injury or damage that happens." In *Hammack v. White* (2), in which the plaintiff was non-suited on account of not giving some "affirmative evidence of negligence," *Erle*, C.J., said "the negligence imputed here is either the unskilful management of the horse, or imprudence of taking a vicious horse into the public street," and he adds:—"There is not the slightest evidence that the defendant had any knowledge whatever of the vicious character of the horse, and he must be presumed therefore to be entirely ignorant of it." In the same case *Willes*, J., said:—"Riding an unmanageable horse in the public street is not *in itself* negligence, it must be shewn that the defendant was acquainted with the character of the animal"—and adds later on, "of course it makes

(1) 3 Bing. 319.

(2) 31 L.J. C.P. 129; 11 C.B. N.S. 588.

no difference whence the evidence comes, whether from the party accused or the party complaining of the negligence." In *Simson v. The London General Omnibus Co.* (3), although no affirmative evidence of negligence could be given, the facts that the panel of the omnibus through which the horse had kicked the plaintiff bore marks of previous kicks; that no precaution had been taken to prevent its recurrence; and that no explanation had been offered on the part of the defendants, were held to be evidence of negligence proper to be submitted to a jury. In that case it was admitted, on behalf of the defendants, that they would have been liable if they had been shewn to have knowingly used an unbroken horse. *Bovill*, C.J., said:—"The mere fact of his having kicked out was, I should say, *primâ facie* evidence for the jury." . . . "Where a horse, from no assignable cause, kicks out, I think the presumption is that he is a kicker. I think there was clearly evidence for the jury." *Grove*, J., said:—"Here there was evidence of other kick-marks on the panel of the omnibus, and that I think threw upon the defendants the necessity of explaining how they came there." These cases all show, I submit, that the fact of driving a horse in a public street addicted to any particular vice, renders the driver or owner liable for the consequences. In *Payne v. Anderson* (4), *Sir G. Innes*, J., said:—"The fact that the plaintiff's horse had bolted on a previous occasion was evidence of contributory negligence." If it is evidence of contributory negligence, it is equally evidence of negligence on the part of a defendant. [He also cited *Manzoni v. Douglas* (5); *Anon.* case (6); *Wakeman v. Robinson* (7).]

Secondly, the plaintiff is entitled to succeed under his present declaration upon such evidence. In the judgment of *Erle*, C.J., in *Hammack v. White* (8), the proposition is taken for granted that, where a vicious horse is knowingly driven, the driver is guilty of negligence. In none of the cases cited does it appear to have been specially alleged that the defendant had driven a vicious or shying horse. Moreover, inasmuch as negligent

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(3) L.R. 8 C.P. 390.

(6) 1 Ventris, 295.

(4) 3 Weekly Notes (N.S.W.) 133.

(7) 1 Bing. 213.

(5) 6 Q.B.D. 145; 50 L.J. C.L. 289.

(8) 31 L.J. C.P. 129; 11 C.B. N.S. 586.

1887. navigation would cover cases of insufficiency of steering gear, or other navigating apparatus, so the putting into a cart of an unsuitable horse would be negligent "management" which was alleged in the declaration, and is a much more comprehensive term than mere negligent driving.

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[FAUCETT, J. Have you any authority for this contention as to navigation?]

No. I regard it as a proposition too firmly established to require authority (a).

It is true that in *Manzoni v. Douglas* (9), Lindley, J., said that to hold that the mere fact of a horse bolting is *per se* evidence of negligence, would be mere reckless guesswork. But he added, "the plaintiff must make out a clear *prima facie* case by evidence which will warrant an inference of negligence." This shews that it is not necessary to allege specifically the kind of negligence relied upon. In that case the action seems to have been for negligent driving: the specific negligence relied on was the horse being addicted to bolting. In *Simson v. The London General Omnibus Co.* (10), the action was also for negligent driving, though the specific negligence relied on was that the horse was addicted to kicking.

THE CHIEF JUSTICE. If I had any doubt in my mind, even though I thought the point was not tenable, I would feel it my duty to grant a rule in order to allow the case to be argued. But I did not at the trial, and I do not now, entertain the slightest doubt on the subject. The rule is moved for in this case on four grounds. I do not think Mr. Bruce Smith has directed his argument to the second ground, so that the case

(a) NOTE.—This point was discussed in a very recent case, the *Warkworth* (L.R. 9 P.D. 20; 52 L.J. P.D. & A. 4). It was held that, where a collision occurred by a defect in the vessel's steering gear, due to the negligence of persons on shore and not to any negligence on the part of the crew, the damage was caused by "improper

navigation," within the meaning of 25 and 26 Vic. c. 63, s. 54, sub-s. 4. This decision was affirmed by the Court of Appeal (*Id.* p. 145; *Id.* p. 65), where Bowen, L.J., said that this would be evidence of "improper navigation," even under the older system of pleading.

(9) 6 Q.B.D. 145; 50 L.J. C.L. 289.

(10) L.R. 8 C.P. 890.

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really turns on the third ground,—“That his Honour was in error in directing the jury that the only evidence of negligence was that given by one of plaintiff's witnesses, to the effect that Drury (the defendant's servant in charge of the defendant's cart) did not appear to be pulling up the horses.” The declaration states that the defendant, by *George Drury, his servant*, “negligently and unskilfully drove and managed a cart and horses” along a highway. It appears to me that the word “managed” there is almost synonymous with the word “drove.” The negligence so charged must be something which took place at the time of the accident—the driving of the horses or the management of the horses, or cart—something which immediately contributed to the accident. It is not sufficient, where in fact the jury find that there was no negligence or unskilfulness in the “driving” or “management,” to attempt to make out that because there was inherent vice in the horse the plaintiff is entitled to recover. Under this particular declaration it is not open to the plaintiff to rely on such evidence, nor would it entitle a Judge to tell a jury that, if the plaintiff proved that the accident was caused by inherent vice in the horse, the plaintiff would be entitled to recover.

In the case of *Christie v. Griggs* (11), the declaration contained two counts—first, for negligent driving, and a second alleging the insufficiency of the carriage. As to the first, the defendant in this case has been cleared by the verdict of the jury. As to the second—that he knew the horse to be a shying horse—that is not charged in the declaration. In *Manzoni v. Douglas* (12) the witness who saw the accident said that the driver was trying to stop the horse. That is exactly the evidence that was given in this case. *Lindley, J.*, said: “We do not know what it was that caused the horse to bolt, and therefore we have no evidence that it was caused by the driver's negligence or want of care. It is said that negligence is to be inferred from the fact that the driver did not call out or give warning. I cannot see that that *per se* affords any ground for inferring negligence. The coachman himself was in fear for his own life; and the probability is that in such circumstances

(11) 2 Camp. 79.

(12) 6 Q.B.D. 145; 50 L.J.C.L. 289.

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even a cool man might abstain from calling out. Then it is said that the fact of a horse having cast one or two shoes was some evidence of negligence; but I cannot see that the fact of a horse having cast a shoe after he has bolted affords any evidence of negligent *driving*. To hold that the mere fact of a horse bolting is *per se* evidence of negligence would be mere reckless guess-work. To entitle him to recover in an action of this kind, the plaintiff must make out a clear *prima facie* case by evidence which will warrant an inference of negligence."

So here, I cannot see that the fact of the horse having shied previously to this day shews any evidence of negligent driving or negligent management on the part of the servant Drury, which is the negligence charged. If it was negligent to permit a shying horse to be used, this would be evidence of negligence on the part of the defendant, and not of the servant Drury; but the defendant is not personally charged with negligence. This man (Drury), the jury having acquitted him of negligence, must be taken to have managed this horse carefully. You may drive a shying horse very carefully, and, notwithstanding your utmost care, he may shy. Therefore, if you seek to recover against the defendant on account of negligently using a shying horse, that ought to be distinctly alleged in the declaration, and not merely alleged as "negligent driving." An action may lie for damages caused by the wrongful use of a shying horse. But the plaintiff's case was "negligent driving" by the defendant's servant. He sought to establish that by various evidence, and then at the end of the case one of the defendant's witnesses said that one of these horses shied at trams. Then the plaintiff's counsel took the point that that was evidence of negligence to go to the jury. I am of opinion that it is not negligence under this declaration. It was, to a certain extent, a hard case on the plaintiff. It was also a hard case on the defendant, as it is not at all likely that he will ever get a farthing of costs from the plaintiff, and I think it would be a great hardship on the defendant to grant a rule in such a case.

FAUCETT, J. I have had considerable hesitation in coming to

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a conclusion whether or not we ought to grant this rule. However, after thinking it over, and after full consideration, I do not think we ought to. It seems to me that, according to the ordinary well-known principles of pleading, this matter would not come within the words "negligent driving" and "negligent management." It does not appear to me that these words can have any reference to an inherent vice in a horse. You cannot mean by careless driving that the horse was unfit to be driven. But it is contended that the word "management" being used, it embraces such matters as this is. I admit that it is a more extensive word. It may include leaving the horse unattended, or putting the cart in some place where it ought not to have been. It is a more comprehensive word than the word "driving;" but how can it be construed so to include driving a horse with an inherent vice? Not the slightest intimation is given to the defendant that he is charged with having an animal unfit to be used in the cart. He is merely charged with improperly driving and improperly managing a cart and horses, and he is not given the slightest intimation that it is intended to charge him with having inferior or vicious horses, or that the cart was defective. He comes into Court; he brings his driver; he proves that the driver is a careful man; that he is a skilful driver; and then it turns out in the course of the evidence that one of the horses is accustomed to shy, that it had some inherent vice. Assuming that the plaintiff knew nothing about this vice in the defendant's horse; and that it was not until nearly the end of the case that this evidence, that one of the horses was addicted to shying, came to light—what is the course the plaintiff ought to have pursued? He should have applied to amend his declaration, and, if there had been reasonable grounds for doing so, the Judge would have allowed the amendment; and then the defendant might have applied for an adjournment to enable him to meet the case under its new aspect. In that way no harm would be done. It is the fault of the plaintiff himself if he does not ask for an amendment when matters of which he was not aware arise unexpectedly. He did not ask to be allowed to amend his declaration, and the case was allowed to go on. It was not till the end of the case that the plaintiff's counsel

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applied to amend; at that stage the application was I think properly refused. For these reasons I think this rule ought to be refused. We have no right to send the case down where we are satisfied that the verdict was right; it would be putting parties to the expense and cost of a re-hearing without any reasonable expectation of a different result.

SIR G. INNES, J. Of course if I thought that there was no probability of the rule being made absolute, I would not be one for granting a rule *nisi*; but I cannot but express my very great regret at the course the case has taken. I find myself in a somewhat unusual position, because I entertain a very strong opinion that the point is not only arguable, but really that the argument on the part of the plaintiff's counsel is unanswerable; and I have the misfortune of being constrained to express this opinion after his Honour the *Chief Justice* has given expression to his view that the matter is not arguable. It is an unfortunate position for me to be placed in, and I may say that, having regard to his Honour's superior learning and greater capacity for judicial matters, I feel that the probability is that his Honour is right and I am wrong; but I am bound to express the opinion which forces itself upon me. The application at present is only for a rule *nisi*, and as a general rule—of course not by any means an universal or invariable rule—where one Judge entertains a strong opinion contrary to the view entertained by another member of the Bench, such a matter is considered arguable. However, in this particular instance, although I have had an opportunity of expressing to his Honour the *Chief Justice*, before judgment was delivered, the view which I entertained, I have been unable to shake his Honour's conviction that the point is not arguable. Of course the granting of a rule *nisi* in no way concludes the point; the refusal, on the other hand, does conclude it once and for all; and for that reason, amongst others, I cannot but express my regret, entertaining as I do a very strong opinion that the present applicant is right in his contention, that the matter could not have been submitted for further argument. With regard to the view just given expression to by his Honour Mr. Justice *Faucett*, his Honour thinks that

the rule should not be granted, though with the expression of some doubt on the point. Of course I can but express my individual opinion, but I must express my regret that the matter has not been submitted for further argument ; for, as I understand both their Honours' judgments, assuming that the declaration had been properly framed, there was evidence of an actionable wrong, and evidence upon which a verdict might have been found for the plaintiff. We have not heard whether the injury sustained was a serious one or not, and of course it is not necessary for our consideration in dealing with a mere question of law ; nor is it a matter of importance for the purpose of considering the abstract question. So far as I understand the judgment of his Honour the *Chief Justice*, the plaintiff failed in this particular trial because the declaration was not properly framed. In point of fact his Honour said that this declaration discloses a cause of action, but a different cause of action from that established by the evidence. If that is so, it is competent for the plaintiff to bring another action, and frame his declaration properly ; and, if he then establishes his right to damages he will be entitled to obtain them. That is a course which, I think, as a general rule is not a desirable one, when the matter may be decided with greater expedition on an amended declaration.

The question remains whether on a declaration which charges the defendant with having negligently "managed" a cart and horses, it is negligent management to put into the cart a horse known full well to be a shying horse. Of course I put on one side the question of negligent or unskilful driving. If the declaration were merely for "negligent driving," I should have no hesitation in expressing my concurrence with their Honours, for certainly you must declare for the negligence you prove, and prove the negligence you declare for ; but it seems to me that the word "management" points to matters in no way necessarily identical with driving, and pointing to negligence which may have been antecedent altogether to the commencement of the driving. It may not be negligent and unskilful management to drive a horse that has shied, or to drive a horse that is a bolter ; but I cannot for the life of me understand how it could be held

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not to be "negligent management" to put into a vehicle a horse known to be of that description, and to proceed to drive such an animal through the public streets. It is said that you must indicate the exact character of the negligence in the declaration. That would probably have been requisite in the old days of particularity in pleading, and I can understand that such an objection might then have obtained, but I have certainly never hitherto understood that for the last thirty years such a thing has been deemed necessary. It might have been necessary in the old days when in an indictment for murder you had to state the particular weapon that was used, the number of blows that were struck, and the particular part of the murdered man's body which had been struck; but the superior wisdom of modern days has declared that sort of thing to be unnecessary; and it must be going back to those days to have to specify the exact character of the misconduct complained of. There are no doubt cases in which it might be more convenient to specify the particular kind of misconduct charged in the declaration, and if there is a general allegation of misconduct, the defendant may make an application to a Judge in Chambers for an order requiring the plaintiff to specify the particular want of skill or negligence charged. But there have been many cases in which there has been quite as wide an application given to these words without any objection being made. With regard to the form of declaration, it is exactly the form of declaration, word for word, which is given in *Bullen and Leake*, where reference is made to a variety of cases. There is one case to which we have been referred—*Crofts v. Waterhouse* (14), which has been quoted in a succession of editions of *Roscoe's Nisi Prius* (I am reading from the 14th edition at p. 698) as an authority for the following passage: "The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road on which he undertakes to drive; *he must be provided with steady horses*, a coach and harness of sufficient strength and properly made, and also with lights by night." And, as I take it, default in any one of these particulars is actionable as improper or negligent management. It is very unusual for a

declaration to allege that the driver did not have sufficient skill, or that the coach or harness was not sufficient. These are included in the general allegation.

It is said that in this case the declaration does not sufficiently charge these things, and, that being so, the plaintiff cannot go into anything except the actual "driving." Take the case of a man sent out with harness altogether insufficient or without a brake on the coach where there is no breeching, or with a rotten breeching and no brake, and an accident inevitably occurs from such negligent management, would anybody say that that would not come under the head of "negligent management" of a coach and horses? Or, again, if a man who does not know how to harness a pair of horses put on the harness so improperly and unskilfully that an accident occurs from his negligence, would anybody say that evidence of that could not be given under the general allegation of unskilful or negligent management? If such evidence can be given in such cases, I certainly think it can be where a man puts into his vehicle a horse which he knows to be unsafe by reason of his being addicted to shying. The mistake into which, in my opinion, their Honours have fallen—if I am not presumptuous in so speaking—is in thinking that the "management" of a carriage and horses only begins after the carriage and horses are brought round to the door. The "management," though of course not the "driving," begins when the operation of harnessing the horses for and attaching them to the carriage is commenced. The furnishing of the requisite equipment is part of the management, and part of the requisite equipment is "steady horses." I am sorry to have to speak so strongly on a matter of this kind, because I should have been much more content to express at this stage of the case, when we are merely asked to grant a rule *nisi*, no opinion whatever beyond saying that I thought the matter deserving of further consideration; but now that the case has been once for all decided, I have felt it incumbent on me to give my reasons.

Rule refused.

Attorney for the plaintiff: *Lyons.*

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1887.

THE QUEEN v. VINING.

Dec. 9.

Criminal law—Arson—Indictment for setting fire to shop with intent to defraud—Shop not insured—Evidence of intent to burn goods which were insured—Conviction sustained—46 Vic. No. 17, ss. 178, 181.

Faucett J.
and
Stephen J.

The prisoner was charged with having “maliciously set fire to a shop with intent to defraud.” No evidence was given that the shop, which was rented, was insured; but it was proved that the goods were insured for 500*l.* The evidence shewed that these goods, except about 50*l.* worth, had been surreptitiously removed before the fire; that fires had been lighted in 27 different places in the shop; and that the building was partially burnt.

For the prisoner, it was contended that, if his object was to burn the goods with intent to defraud, he could not be convicted of setting fire to a shop with intent to defraud, the shop being uninsured.

Held, that the setting fire to the goods and the setting fire to the shop were so much one act that it was impossible to separate them; and that as it was clear that his object was to burn the goods, the intention was not too remote. Conviction sustained.

CROWN CASE RESERVED.

Special case stated by Sir G. Innes, J.

“The prisoner was convicted before me at the Central Criminal Court upon an indictment which charged him with having on the 9th day of October, 1887, at Newtown, *maliciously set fire to a shop* at Newtown aforesaid (in the possession of him the said Joseph Vining), with intent thereby to defraud. The evidence clearly made out the following facts:—The prisoner was a grocer, having one shop in Oxford-street, Paddington, where his wife and family resided, and another, a smaller shop, in the Enmore-road, Newtown. The prisoner in the month of May last insured his stock-in-trade of the Newtown shop with the City Mutual Insurance Company for 500*l.* The prisoner was the lessee of the house, which was apparently uninsured. At the time of the insurance the stock-in-trade was worth some 450*l.* or 500*l.* From a period somewhere about June or July the stock was steadily diminishing, sales being made and no further stock being brought in. Some few weeks before the fire considerable quantities of the stock were being sent away, not in the ordinary course of business, but under suspicious circumstances; and at the time of the fire the whole stock was of a value not exceeding some 50*l.* or 60*l.*, while in the shop on the shelves was a quantity of ‘dummy’

cases and bottles. The fire took place on the night of Sunday, the 9th day of October. On the Wednesday previous a large quantity of goods was seen being sent away in the cart of a person named James Richards, a friend of the prisoner, a carpenter by trade, and who a few months before the fire was carrying on that trade, but who has since June or July become a grocer. On the Saturday immediately before the fire young Richards, a boy, son of James Richards, brought out some bags of shavings to the shop of the prisoner at Newtown, and acquainted the prisoner with that fact. The prisoner's shop was closed at midnight on Saturday, and the prisoner remained the sole occupant of the premises until between 2 and 3 o'clock next afternoon (Sunday). The defence was an *alibi*; but while the prisoner was proved conclusively to have been on the premises till 2 or 3 o'clock in the afternoon, and later for some time at his shop in Oxford-street, his presence elsewhere than at Newtown was not accounted for at a critical period, viz., between 6 or 6.30 and 8.30 that evening. The fire was observed between 8.30 and 9 o'clock that same evening, the attention of a witness being directed to it by a loud explosion of gas, the front windows, shutters and door being blown down by the explosion. Alarm was given, firemen with hand-engines were on the spot within a few minutes, and in about a quarter of an hour the fire was got under. On inspection of the premises it was seen that in no less than six or seven different places, altogether distinct and separate from one another, fires had been lit, and in no less than 27 places, including the six or seven actually ignited, deliberate preparation had been made for fires, shavings saturated in kerosene, small pieces of broken up boxes, such as had been used in the prisoner's stock, candles, lard, bacon-fat, and other inflammable substances had been carefully arranged, evidently to give every facility to the spread of the fire, and had been placed in such positions that it was not possible they could have taken fire without setting fire, not only to the goods, but to the shop itself. Although the fire was got under so speedily, a considerable portion of the building itself was burnt. There can be no question whatever that the fire was the work of an incendiary, and that that incendiary was the prisoner.

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"Mr. Rogers (for the prisoner) contended that there was no evidence of setting fire to the shop with intent to defraud; in other words, that there was no evidence to sustain the indictment, and asked me so to rule. I declined to do so, and upon his request, reserved that point for the consideration of the Full Court.

"Mr. Rogers also asked me to tell the jury that 'if they thought the prisoner set fire to the shavings, boards, &c., with the object of burning the stock, so as to get the insurance money, the prisoner should be acquitted on this information, even although part of the shop was actually burnt.' I declined to do so, and at his request reserved this point also for the consideration of the Full Court.

"I told the jury that in order to find the prisoner guilty on this indictment, it would not be enough to show that the prisoner had merely set fire to goods in the shop, but that it must be proved that some part of the shop itself was burnt; that although the prisoner's object may have been to defraud the insurance company who had insured the goods only, yet that if he knew that in setting fire to the goods in all probability the shop itself would thereby be set on fire, and that he was reckless whether it was so or not; and if the evidence convinced them that in fact the shop itself was thereby set on fire, they might find him guilty of setting fire to the shop. As to the intention to defraud, I told them that if under such circumstances the shop was set on fire by the prisoner's act, even although the house itself was not insured, yet if the prisoner intended by so setting fire to defraud the insurance company in respect of the goods, the fraudulent intent was sufficiently made out.

"The prisoner was sentenced to six years' penal servitude.

"The question for the Court is: Was I right in declining to tell the jury as Mr. Rogers requested me to tell them?"

Rogers, for the prisoner. The indictment having been framed under s. 178 of 46 Vic. No. 17 (1), for having maliciously set

(1) 46 Vic. No. 17, s. 178:—"Whosoever maliciously sets fire to any dwelling-house, or warehouse, office, shop, mill, person, shall be liable to penal servitude for fourteen years," whether the same be then in possession

fire to the shop with intent to defraud, and there being no evidence that the shop was insured, the conviction cannot stand. If the indictment had contained the words "with intent to injure," instead of "with intent to defraud," I could not be heard now, as the prisoner would be taken to have intended the necessary consequences of his own acts. He ought to have been indicted under s. 181 (2). There cannot be indirect intent; i.e., an intent to burn goods with intent to defraud. He cited *R. v. Lyons* (3); *R. v. Child* (4); *R. v. Vattrass* (5); *R. v. Harris* (6); *Roscoe's Cr. Ev.* (10th Ed.) 295.

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Healy, for the Crown, in support of the conviction. There was ample evidence to shew the object with which the place was set on fire. The intent to defraud permeates the prisoner's whole action; and the facts shew that his one intent was to defraud the insurance company.

FAUCETT, J. I have had no doubt at all about this matter. The evidence shows that in no less than 27 places in different parts of the house fires had been lighted, for the purpose of defrauding the insurance company. The indictment charged the prisoner with maliciously setting fire to a shop with intent thereby to defraud. It is said that the intention is too remote; that he cannot be charged with setting fire to the shop with the intent to set fire to the goods with intent to defraud. There is no question of indirect intent. The plain and actual intention is shewn in every way. It is only right that a man who is guilty of one crime should not be convicted of another crime. But it seems to me that the whole thing is simple enough. The setting fire to the house and the setting fire to the goods are so much one act that it is impossible to separate them. The ruling intention was to set fire to the goods with intent to defraud the insurance company. We cannot lay aside the ordinary rules of

(2) 46 Vic. No. 17, s. 181:—"Whosoever maliciously sets fire to any matter or thing being in against or under any building—under such circumstances that if the building were thereby set on fire, the offence would amount to felony—shall be liable to penal servitude for seven years."

(3) 28 L.J. M.C. 33.

(4) L.J. 1 C.C.R. 307; 40 L.J. M.C. 127.

(5) 15 Cox 73.

(6) 15 Cox 75.

1887. logic. We cannot lay aside the true principles of law. His
THE QUEEN ruling object, and therefore his direct object, was to defraud.
 v. The burning of the goods was only a part of the one act. I also
VINING. think his Honour was perfectly right in refusing to say that
Faucett J. there was no evidence to support the indictment.

STEPHEN, J. I must confess I have had great difficulty in coming to a conclusion in this case; but I do not dissent. No doubt the justice of the case is entirely met by the view taken by his Honour Mr. Justice *Faucett*.

Conviction sustained.

Dec. 24.

THE QUEEN v. GOLDBERG.

The C.J.
Faucett J.
 and
Stephen J.

Criminal law—Fraudulent insolvency—Objections to indictment—46 Vic. No. 17, ss. 310, 315, 423—Status of Insolvency Court—38 Vic. No. 1—Affidavits—Proof of insolvency—Evidence—“Substantial wrong or other miscarriage of justice.”

Upon an indictment charging the prisoner in three counts:—1. For that his estate having been “duly ordered and adjudged to be sequestrated as insolvent” . . . he did “wilfully and fraudulently, &c., embezzle, &c., certain parts of his estate, effects, goods, money, &c.” 2. That he “wilfully and knowingly did falsify and mutilate certain books of account belonging to the said estate, &c.” A third count charging him with having contracted a debt fraudulently was struck out at the trial. The prisoner was acquitted on the second count, but found guilty on the first. The following points were reserved:—

1. That the indictment is bad because it includes different offences not of the same kind.

2. That the indictment is bad because it includes more than three distinct offences.

3. That there is no legal evidence that the estate of the prisoner was adjudged to be sequestrated as insolvent.

4. That his Honour improperly admitted in evidence a paper purporting to be a rule *nisi*, and a paper purporting to be a rule absolute, adjudging the estate of the prisoner to be sequestrated.

5. That the said alleged order *nisi* and order absolute are improperly intitled “In the Supreme Court of New South Wales, in Insolvency.”

6. That the necessary affidavit in support of the said alleged petition was not sworn in the manner required by law.

7. That there was no evidence of the receipt by the prisoner of the sums of 396*l.* 0*s.* 8*d.*, 650*l.* and 68*l.* 12*s.* respectively, or any of them.

Held (as to first and second points), that the objections ought to have been taken by way of demurrer or motion to quash the indictment under s. 310 of 46 Vic. No. 17.

Held (as to the third and sixth points), that an order in the Insolvency jurisdiction, being, by 38 Vic. No. 1, s. 1, equivalent to a judgment of the Supreme Court, could not be impeached except by way of appeal. *Per* the C.J. The affidavit in support of the petition was properly sworn before a commissioner for affidavits by virtue of 37 Vic. No. 10. 1887.

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Held (as to the fourth point), that it was unnecessary to have tendered the rule *nisi* in evidence; that the Insolvency Court being a Court of record, it was not necessary for the Judge to sign the order absolute; and the paper purporting to be the order absolute was a proper record of the order.

Held (as to the fifth point), that by 38 Vic. No. 1 the papers were properly intituled "In the Supreme Court of New South Wales;" if not, the words might be rejected as surplusage.

Held (as to the seventh point), that as it was admitted that there was evidence to go to the jury as to the sum of 750*l.*, the point could not be sustained as to the other sums.

Per Stephen, J. (as to the first and second points), while concurring with the rest of the Court, was content to rest his judgment upon the proviso to s. 423 of 46 Vic. No. 17, that there was no "substantial wrong or other miscarriage of justice."

CROWN CASE RESERVED.

Special case stated by Sir G. Innes, J.:—The prisoner was, at the present sittings of the Central Criminal Court, convicted before me on the 8th December, 1887, of the crime of fraudulent insolvency. The following is a copy of the indictment:—

New South Wales, to wit. The Honourable Bernhard Ringrose Wise, her Majesty's Attorney-General for the colony of New South Wales, who prosecutes for her Majesty in this behalf, being present in the Supreme Court at Sydney on the 29th day of November, 1887, charges that heretofore, to wit on the 17th October, 1887, at Sydney, in the colony aforesaid, one Abraham Goldberg, being insolvent within the meaning of a certain Act of Council, passed in the 5th year of our Sovereign Lady the Queen, intituled "An Act for giving relief to insolvent persons, and providing for the due collection, administration and distribution of insolvent estates within the colony of New South Wales, and for the prevention of frauds affecting the same," the estate of him the said Abraham Goldberg was on the day and year last aforesaid duly ordered and adjudged to be sequestrated as insolvent, and was sequestrated accordingly. And the said Attorney-General further charges that the said Abraham Goldberg, before his estate was so sequestrated as aforesaid, at divers times in the year of our Lord, 1887, at Sydney aforesaid, in the colony aforesaid, unlawfully, wilfully, and fraudulently, and with intent to defraud one Frederick Thomas Sargood and others the creditors of him the said Abraham Goldberg in that behalf, *did* *embezzle, conceal, retain, and remove certain parts of his the said Abraham Goldberg's estate, effects, goods, money, and credits, to the value of ten pounds at different times, to wit, the following sums at the times respectively hereinafter named*—396*l.* 0*s.* 8*d.* on the 12th May, 1887; 750*l.* on the 12th May, 1887; 650*l.* on the 3rd June, 1887; 68*l.* 12*s.* on the 30th May, 1887.

1887. 2. And the said Attorney-General further charges that heretofore, to wit, on
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GOLDBERG. the 17th October, 1887, the said Abraham Goldberg, being indebted to the said Frederick Thomas Sargood and others in divers large sums of money, the estate of him the said Abraham Goldberg was duly ordered and adjudged to be sequestrated as insolvent, and was sequestrated accordingly, as in the first count of this information is particularly charged and stated. And the said Attorney-General further charges that before the estate of the said Abraham Goldberg had been so sequestrated as aforesaid, to wit, on the 1st October, 1887, the said Abraham Goldberg, at Sydney, in the colony of New South Wales, *wilfully and knowingly did falsify and mutilate certain books* of account belonging to the said estate, to wit, the cash-book, ledger, and salesbook, with intent to defraud the said Frederick Thomas Sargood and others the creditors of the said Abraham Goldberg.

The prisoner was found guilty upon the first count, and acquitted upon the second count.

I remanded prisoner for sentence, and he is now in gaol under such remand.

After the jury had retired to consider their verdict, I, at the request of Mr. *Simpson*, Q.C., counsel for the prisoner, reserved for the consideration of the Judges of the Supreme Court—in accordance with section 422 of the *Criminal Law Amendment Act* of 1883—the following questions of law :—

1. That the indictment is bad, because it included different offences not of the same kind.
2. That the indictment is bad, because it includes more than three distinct offences.
3. That there is no legal evidence that the estate of the prisoner was adjudged to be sequestrated as insolvent.
4. That his Honour improperly admitted in evidence a paper purporting to be a rule *nisi*, and a paper purporting to be a rule absolute, adjudging the estate of the prisoner to be sequestrated.
5. That the said alleged order *nisi* and order absolute are improperly intituled “In the Supreme Court of New South Wales, in Insolvency.”
6. That the necessary affidavit in support of the said alleged petition was not sworn in the manner required by law.
7. That there was no evidence of the receipt by the prisoner of the sums of 396*l.* 0*s.* 8*d.*, 650*l.*, and 68*l.* 12*s.* respectively, or of any of them.

I ruled against Mr. *Simpson's* contentions.

The question for the considerations of their Honours is: 1887.
Was I right in so ruling?

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Salomons, Q.C. (G. B. Simpson, Q.C., and G. H. Reid with him), for the prisoner. As to the first and second points, on the objection being taken that the three offences charged in the three counts of the indictment were not of the same kind, the learned Judge struck out the third count charging the prisoner with having contracted a debt fraudulently. If contracting a debt fraudulently is not of the same kind as embezzling money, *a fortiori* offence of mutilating books is not.

[STEPHEN, J. Ought not the point to have been taken on demurrer?]

How could the prisoner demur to any one of these counts?

[THE CHIEF JUSTICE. You could have demurred to the whole indictment, as in special demurrer at common law you could formerly have demurred to the whole declaration.]

This is not a "formal defect" within the meaning of s. 310 (1) of 46 Vic. No. 17. These offences not being "of the same kind" within the meaning of s. 316 (2), the Judge ought to have put the Crown to their election: *Archb.* (19th Ed.) 75. As to the third, fourth, fifth and sixth points. The defendant had not been made insolvent according to law. The petition for compulsory sequestration had been filed by a person acting under a power of attorney for a creditor, and that power of attorney was not proved before the Chief Commissioner of Insolvent Estates. The power of attorney not having been proved, the whole proceedings were null and void, and the conviction cannot stand.

(1) 46 Vic. No. 17, s. 310:—Every afterwards the trial shall proceed as if no such defect had appeared.

(2) 46 Vic. No. 17, s. 316:—In every case not capital, counts may be inserted in the same indictment against the same person for any number of distinct offences of the same kind, not exceeding three, committed against the same party, &c.

1887. [The CHIEF JUSTICE. By s. 107 of 5 Vic. No. 17 proof of the
 THE QUEEN adjudication is sufficient. Besides, the insolvent had the oppor-
 v. tunity of taking this objection before the Chief Commissioner.
 GOLDBERG. Is it not too late to take the point now?]

No ; because the requisite proof not having been given, the estate was not *duly* adjudged to be sequestrated. S. 107 does not say that the production of the order shall be *conclusive* proof of the adjudication. I do not contend that the Crown is in all cases bound to prove that the adjudication was properly made ; but if the prisoner, as here, can shew that it was made without jurisdiction, then the proceedings are an absolute nullity. [He cited *Ex parte Morris* (3) ; *R. v. Robinson* (4).] It is not enough to prove the petition and the adjudication, but the preliminary matters must also be proved : *R. v. Lands* (5) ; *Re v. Jones* (6). In *R. v. Levi* (7) the defendant was not allowed to take advantage of any irregularity in an adjudication which he had not appealed against, because by statute such adjudication was conclusive evidence of the bankruptcy. S. 107 of 5 Vic. No. 17 does not say that such evidence *shall be conclusive*. Again, this affidavit in support of the petition was not sworn before a commissioner in insolvency as required by s. 15 of 5 Vic. No. 17. It is true that it has been the practice for such affidavits to be sworn before commissioners for affidavits appointed under 37 Vic. No. 10 ; but s. 15 of the former Act must be construed strictly ; and ss. 1 and 2 of 7 Vic. No. 19 provides for the appointment of "commissioners" under 5 Vic. No. 17, that is, Commissioners in Insolvency, before whom these affidavits must be sworn.

[The CHIEF JUSTICE. By s. 1 of 37 Vic. No. 10, persons appointed to be commissioners for taking affidavits may "take and receive affidavits concerning any matter within the jurisdiction of *any* Court."]

Suppose the word "commissioners" were omitted from s. 15

(3) 14 Q.B.D. 385.

(6) 4 B. & Ad. 345.

(4) L.R. 1 C.C.R. 80.

(7) Leigh & C. 597.

(5) Dears. C.C. 567 ; 25 L.J. M.C. 14.

of 5 Vic. No. 17, would an affidavit, required by that section to be made before one of the Judges be properly made before a commissioner under 37 Vic. No. 10 ?

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[The COURT called upon counsel for the Crown at this point.]

Armstrong (Healy with him) for the Crown. It was too late at the trial, and it is too late now, to re-open the proceedings in the Insolvency Court which took place before the adjudication. The insolvent was represented by counsel when the rule *nisi* for compulsory sequestration was made absolute. He ought to have raised the objection then, and, if necessary, to have appealed. The cases cited on behalf of the prisoner were all referred to in *R. v. Hughes* (8), in which it was held that upon an information like the present, the order for sequestration of the defendant's estate under the hand of the Chief Commissioner was, under s. 107 of 5 Vic. No. 17, and 25 Vic. No. 8, s. 4, sufficient proof of the sequestration. There *Wise, J.*, said, at p. 75 : "The decisions in bankruptcy do not bind any other Court, but the decision of the Chief Commissioner in Insolvency is a binding decision, unless appealed from ; a wrong decision ought to be got rid of by appeal." As to the mode of taking the affidavit, it has been the practice for many years to allow affidavits taken before commissioners appointed under 37 Vic. No. 10 ; and it would give rise to great inconvenience to hold that all insolvency proceedings in which such affidavits had been used were invalid.

[STEPHEN, J., referred to the Forms under the Act 5 Vic. No. 17, by which it appeared that these affidavits could be taken before commissioners for taking affidavits.]

That is so, by Rule 29. These Rules were made by the Judges of the Supreme Court, under s. 103 of 5 Vic No. 17.

Salomons. There is another objection in these grounds. Here it was not the original adjudication, signed by the Chief Commissioner, as required by s. 107, which was produced at the trial, but only a copy, signed by the Registrar.

1887. [The CHIEF JUSTICE. The Insolvency Court is a Court of
 THE QUEEN Record, and its judgments are signed by its officers.]
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I contend that the affidavit being bad, the adjudication was made without jurisdiction. *Buller, J.*, says, in *Allan v. Dundas* (9) (at p. 130), in reference to the proposition that a probate is conclusive till it be repealed :—"The distinction is this : if they (the Ecclesiastical Court) have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places : but where they have no jurisdiction, their whole proceedings are a nullity." A probate, unrevoked, is not conclusive proof of the validity of a will : *R. v. Buttrey* (10). If this were a capital case, the Court would allow this objection to prevail, therefore it must prevail now. Again, in *Ex parte Shoveller* (11), it was held that a petition for sequestration was not a proceeding in the Supreme Court, for preparing which a person other than a barrister, attorney, &c., could be convicted under the *Attorneys Act* (11 Vic. No. 33, s. 13).

G. B. Simpson, Q.C., asked, on the authority of *R. v. Griffin* (12), and in the special circumstances of the case, to be allowed to follow generally on the same side.

The COURT declined to hear him, except as to the seventh ground, which had not been argued ; and as a matter of favour allowed him to argue this ground.

Armstrong, for the Crown. As to the first and second grounds, the objection ought to have been taken by demurrer, or motion to quash the indictment, under s. 310 (13) of 46 Vic. No. 17. That not having been done, the defect, if any, was cured by the verdict : *Archb.* (19th Ed.) p. 68. As to the point that the proceedings were not properly intituled in the Supreme Court, 38 Vic. No. 1 expressly provides for the continuance and exercise of "the insolvency jurisdiction of the Supreme Court." As to the sixth point, by 38 Vic. No. 1, s. 1, orders made in the insolvency

(9) 3 T.R. 125.

(10) *Russ. & Ry.* 342.

(11) *Knox* 174.

(12) 10 S.C.R. 90.

(13) *Supra* note (1).

jurisdiction "shall have the same force as if they were judgments at law or decrees in equity." Therefore, an order so made, and standing unreversed, cannot be called in question. *Ex parte Robinson* (14) does not apply. There the order having been made declaring a married woman a bankrupt, and the property in question not being her separate estate, the Court held that she could not be convicted of having embezzled *her property*, as the property was her husband's. Apart from the enormous inconvenience to the community, and the consequences that would result in invalidating titles to land purchased from official assignees, if the Act 37 No. 10 had been intended not to apply to proceedings in insolvency, it would have expressly said so. Lastly, in *Revell v. Blake* (15) it was held that a copy adjudication in the *Gazette* was conclusive evidence of bankruptcy, notwithstanding that the County Court Judge was admittedly in error in so adjudicating.

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Simpson asked to be allowed to reply.

Armstrong referred to Rule 4 of 1st December, 1857: *Pilch* par. 584. "Every special case shall be heard at the Court-house in King-street, and the party at whose instance it was reserved shall begin, but have no right of reply."

[The CHIEF JUSTICE. The Court will allow you to comment on *Revell v. Blake* (15), such case having been cited in reply.]

The arguments were heard on December 16th and 23rd, when the Court reserved judgment.

On December 24th,

Dec. 24.

The CHIEF JUSTICE. In this case the prisoner was indicted under the 73rd section of the Act 5 Vic. No. 17, for embezzling certain of his effects to the value of 10*l.*, and in the same information he was also indicted for mutilating his books. There was, I understand, a third count, which was, however, struck out at the trial. On the second charge, that of mutilating

(14) L.R. 1 C.C.R. 80.

42 L.J. C.P. 165. And see *Ex parte*

(15) L.R. 7 C.P. 300; 41 L.J. C.P. *French, In re Trim*, 52 L.J. Ch. (Bkcty.) 129; and (in Ex. Ch.) L.R. 8 C.P. 533; 48.

1887. his books, the prisoner was acquitted, so that there only
THE QUEEN remains the first count charging him with embezzling, concealing,
v. retaining, and removing certain parts of his estate to the value
GOLDBERG. of 10*l*. At the trial fifteen points were taken by counsel for the
The C.J. prisoner, but they were afterwards reduced to seven, upon which
the Court is now called upon to adjudicate, and I propose to go
through these points *seriatim*, in order to express the conclusions
to which I have come on each of them. I am of opinion that the
conviction must be sustained. The first point is that the
indictment was bad because it included different offences not of
the same kind ; and the second objection, which may be taken
as portion of the first, is that the indictment was bad because it
included more than three distinct offences. Whether this case
came within the 316th section of the *Criminal Law Amendment*
Act (2), we are not now called upon to decide, but I am of opinion
that these objections to the indictment ought to have been made
by way of demurrer or motion to quash the indictment under s.
310 of the same Act (1). Supposing that the indictment did
contain different offences, not of the same kind, the defect was
most clearly in my opinion cured by the verdict. The objection
ought to have been taken by way of demurrer ; and being raised
after the conclusion of the trial, or at any time after the trial
commenced, it came too late. I will refer to the case of *Nash*
v. The Queen (16) in order to support that proposition. That
was an indictment under the *Bankruptcy Act* of 1861, and in one
count the prisoner was indicted for defrauding and defeating his
creditors by not fully and truly discovering to the best of his
knowledge and belief, at the examination held in the Court, the
whole of his assets, and having given one creditor a preference ;
and further, that he did not truly and fully discover to the best
of his knowledge and belief how and to whom and for what con-
sideration he disposed of his assets. Now there were two
distinct charges there. In my opinion that case sufficiently
disposes of both these objections ; and is in fact an *a fortiori*
case. The third point is that there was no legal evidence that
the estate of the prisoner was adjudged to be sequestrated as
insolvent, and I understand that that point is intended to raise

very much the same question as the sixth, which is "that the necessary affidavit in support of the said petition was not sworn in the manner required by law." I do not know that the third point is in any way touched upon or argued except as bearing upon the sixth, and I take it that the third and sixth are intended to raise the same point, though possibly in different aspects. The view I take of the case renders it unnecessary to decide whether this affidavit was sworn before a proper person or not, although, for reasons which I will presently mention, I think it my duty to state my opinion upon that point. In my view these points really depend upon the first section of the 38 Vic. No. 1. It is unnecessary for the purposes of this case to allude to the whole of that section, but the section is in point of fact divisible into six distinct portions. The first portion is in the following terms:—"The insolvency jurisdiction of the Supreme Court, or of a Judge thereof, shall continue to be exercised as a superior Court of record, of law, and equity." The second portion states, "And the orders in such jurisdiction shall have the same force as if they were judgments at law or decrees in equity of the said Supreme Court." Then the fourth portion is as follows:—"And such Chief Commissioner shall, for the purposes of such jurisdiction, and of this Act, have and may exercise cumulatively with any powers now by law vested in him all the powers and authority possessed and exercisable from time to time by the Supreme Court or a Judge thereof." Now, here is an adjudication in insolvency under the 26th section of the Act 5 Vic. No. 17, and prisoner's estate has been adjudged as insolvent. That, by the very words of the particular section to which I have just referred, is equivalent to and has the same force as if that adjudication was a judgment of the Supreme Court, or a decree in its equity jurisdiction. It is sought, however, by the prisoner to impeach the judgment because the affidavit which had to be sworn previous to presenting the petition was not sworn before a proper officer. That is an objection which I think it is not open for any person whose estate has been adjudged to be insolvent to take, except by way of appeal. He cannot, if there has been a judgment, impeach that judgment in another branch of the Supreme Court or in the Supreme Court itself, any more than he

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could impeach a decree in Equity on the ground that there was no jurisdiction, or any more than a Court of Equity could impeach a judgment of this Court on the ground that there was no jurisdiction. The case referred to yesterday—*Revell v. Blake* (17), goes exactly in the same direction and upon the same principle. The 66th section of the English *Bankruptcy Act* of 1869, upon which Act that case is decided, is not nearly so strong as the 38 Victoria No. 1. *Blackburn, J.* (at p. 544), after referring to the several sections, adds:—“I think the intention was that the order of the Court of Bankruptcy should not be open to question in collateral matters, as for instance an action by the trustee against an alleged debtor to the estate, or criminal proceedings in respect of any of the offences under the bankrupt laws.” I am of opinion that the words of our Act are very much stronger than the words of the English Act, and if under the English Act a superior Court cannot treat the judgment of one of the other Courts as a nullity, and can only deal with it if appealed against, then, *a fortiori*, the Supreme Court in this colony can only deal with such a matter by way of appeal. We can no more question the jurisdiction of the Insolvency Court having jurisdiction both over person and property—as in this case—than we can question the jurisdiction of the Primary Judge adjudicating upon any matter that may be brought before him. And we cannot in this Court examine the different steps which led up to the decision any more than—the Primary Judge having given a decree in Equity—we can examine the different steps which led up to that decree. They are either one and the same Court, which is the Supreme Court, or, if not one and the same Court, then the orders of the other Court—that of Insolvency—must be treated as if they were the orders of this Court. On these grounds I think the objection entirely fails. Although not now, perhaps, necessary for the purpose of the decision in this case, I think it right to state that in my opinion the affidavit in question was properly sworn before a commissioner for affidavits. In this I differ from one of my learned brethren. Previous to the passing of the Act 37 Vic. No. 10, considerable doubt may have existed as to whether the

affidavit should not have been made before one of the Judges or a commissioner appointed under 5 Vic. No. 17, but since the passing of 37 Vic. No. 10, I have no doubt that the statute did give a commissioner of affidavits authority to take affidavits concerning any matter within the jurisdiction of any Court or Courts, and, therefore, the words of the 15th section of 5 Vic. No. 17 must now by virtue of that statute be added so as to read "make an affidavit in writing before the Commissioner or a Commissioner for Affidavits." Previous to the passing of the 37 Vic. No. 10, commissioners for affidavits could only take affidavits in matters pending in the Court. They had only the same power then that justices of the peace now have. It appears to me that the 37 Vic. No. 10 was passed to get rid of the difficulty which arose in *Perry's* case, to which Mr. *Simpson* referred, and to give commissioners of affidavits power to take affidavits in all matters, whether pending or not pending, which affidavits were to be used in all matters before the Court. I am, therefore, of opinion that the affidavit in question was properly taken before a commissioner of affidavits. I do not think it necessary to go further in this particular matter, although I would have been quite prepared to do so, and to have held that even if the affidavit was not made before the proper person, the objection came altogether too late. I am of opinion, therefore, that the third and sixth points fail.

Now, the fourth point is that his Honour improperly admitted in evidence a paper purporting to be a rule *nisi* and a paper purporting to be a rule absolute adjudging the estate of the prisoner to be insolvent. I do not understand how it was that the evidence of the rule *nisi* was tendered in evidence, because the 107th section of the *Insolvency Act*, 5 Vic. No. 17, makes the adjudication sufficient proof, but in any event I think it was properly signed by the Judge; and with respect to the rule absolute, the Insolvency Court, being a Court of record, the rule absolute need not be signed by the Judge. The Judges of the Supreme Court do not sign rules absolute, and the proper evidence of the judgment of the Court is the judgment roll, signed by the Prothonotary or some officer in his behalf. I am of opinion that it was unnecessary that the Chief Commissioner in Insolvency, who sits as a Judge of a Court of record, should

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sign the order absolute, and therefore the paper purporting to be an order absolute is the proper evidence of this order. Therefore, that point also fails.

Then the fifth objection is—"that the said alleged order nisi, and order absolute, are improperly intituled 'in the Supreme Court of New South Wales—in Insolvency.'" The 38th Vic. No. 1 is, in point of fact, a sufficient answer to that objection, because there is the order of the Court. I am of opinion that, by force of 38 Vic. No. 1 it is properly entitled, and that the proper title of an order of the Insolvency Court is "in the Supreme Court of New South Wales." But even if I had come to a contrary conclusion I should be of opinion that the words "in the Supreme Court of New South Wales" might be rejected as surplusage.

That brings me to the consideration of the last ground, which was argued yesterday by Mr. *Simpson*. The seventh ground is "that there was no evidence of the receipt by the prisoner of the sums of 396*l.* 0*s.* 8*d.*, 650*l.*, and 68*l.* 12*s.* respectively, or any of them." There are four sums mentioned in the count independently of these three sums. There is a sum of 750*l.*, and it may be taken as admitted by the learned counsel for the prisoner that at any rate there was evidence to go to the jury that 750*l.* was received by the prisoner. I am of opinion, without going any further, that that disposes of the point, and that if there was evidence of any one sum to go to the jury that was sufficient, but I also think that there was evidence to go to the jury as to the other sums. I am, therefore, of opinion that the seven points have failed, and that the conviction should be sustained.

FAUCETT, J. I concur. I will not go through all the points. There is, however, one point of great importance upon which I think it necessary to express my opinion, and that is as to the effect of the affidavit signed by a commissioner for affidavits and not by a commissioner under the *Insolvency Act*. I was struck with the arguments of Mr. *Salomons*, and upon reading the Act I confess that I am in considerable doubt, and I am inclined to think that the affidavit should have been sworn before a commissioner under 5 Vic. No. 17; but it is quite clear to me now, after consultation with the other Judges, that it is not necessary

to decide the point. The 38 Vic. No. 1 fairly gets rid of this objection and renders it immaterial, and makes the adjudication of the commissioner of insolvency equivalent to a judgment of the Supreme Court in any branch of its jurisdiction, and no attempt can be made to make a judgment of the Supreme Court null and void because a proceeding under which that judgment was given was not properly initiated by the Supreme Court. I think that, to hold that it could, would be contrary to every principle which governs the judgments of any Supreme Court or Court of record. The judgment is final and conclusive under the 38 Vic. No. 1, which completely gets rid of the objection. Now I confess that I have not the same apprehension as his Honour the *Chief Justice* seems to have about the result of our decision upon that point, and as to the effect on property of a wrongful initiation—supposing it were wrong—by using an affidavit made before a commissioner for affidavits rather than a commissioner in insolvency. I have no apprehension at all about it, and I cannot conceive, with this Act 38 Vic. No. 1 in existence, how any holder of property after adjudication can be in any degree prejudiced. I can see no use in the Act 37 Vic. No. 10 unless an affidavit taken before a commissioner for affidavits can be used in any Court, and therefore in the Insolvency Court. Besides, we have the authority of the Judges who drew up the forms in pursuance of the Act 5 Vic. No. 17; and one of these forms shews that these affidavits may be made for a commissioner for affidavits; and the only way to get rid of these forms is by appeal to the Privy Council. As to the other matters, they are really so small that I do not think it necessary to refer to them, except to say that I concur with his Honour that the conviction must be sustained.

STEPHEN J. If the counts of the indictment were bad the point ought to have been taken by way of demurrer, or motion to quash the indictment; but I am quite content to rest my judgment upon the proviso to the 423rd section, which says “unless for some substantial wrong or miscarriage of justice” no conviction shall be reversed. I can certainly see no substantial wrong or miscarriage of justice in the framing of this

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1887. indictment. On the question whether the affidavit has been properly sworn, I think that the apprehension expressed by the Chief Justice was in reference to cases in the future where objection may possibly be taken before the Commissioner when rules *nisi* come to be made absolute, and his Honour expressed an opinion that, as far as he was concerned, the objection would not be recognised. I do not say that I quite agree with him as to the affidavit, because I do not think that the Act 37 Vic. No. 10 makes an affidavit sworn before a commissioner of affidavits of the same effect as, or equivalent to, an affidavit sworn before a Judge or the Chief Commissioner in Insolvency. With regard to the 7th objection, I think there was evidence to go to the jury of the receipt of the 750*l.*, and also portion of the 68*l.* 12*s.*, and the 396*l.* 0*s.* 8*d.*

Objections overruled and conviction affirmed.

Conviction affirmed.

Attorney for prisoner: *J. M. Ourtis.*

Jan. 21.

EDOLS v. TEARLE.

Privy
Council.

Crown Lands Act (48 Vic. No. 18), s. 21—Lands comprised within leasehold areas—Forfeited conditional purchases open to re-selection.

Conditional purchases, being locally within the ambit of the leasehold area, but not being part of the area actually leased, revert, on forfeiture, to the Crown, and are not exempt from conditional sale, as being "lands comprised within leasehold areas" under s. 21, subs. III.

The decision of the Supreme Court (*a*) reversed (3 W.N. 60).

JUDGMENTS of the Lords of the Judicial Committee of the Privy Council on the appeal of *Tearle v. Edols*, from the Supreme Court of New South Wales, delivered 21st January, 1888.

Present: Lord Watson, Lord Fitzgerald, Lord Hobhouse, Lord Macnaughten, Sir Barnes Peacock.

This appeal is from a judgment of the Supreme Court of New South Wales in favour of the plaintiff Edols. The action is brought to recover damages for an alleged trespass on land in

(*a*) 7 N.S.W. L.R. 374.

the colony. It is not necessary to refer to the declaration, as a special case, stated by consent, gives admitted facts and questions for the consideration of the Court.

That special case, dated the 20th July, 1886, stated, *inter alia*, that—

1. Before the making of the conditional purchase by John Stewart, the plaintiff was, and has still continued to be, the lessee from the Crown of the Burrawang Run. 2. On the 9th day of February, 1882, the said John Stewart, under the land laws then in force, conditionally purchased 640 acres of land situated on the said run. 3. Upon the passing of the *Crown Lands Act* of 1884 (48 Vic. No. 18), the plaintiff, as such lessee as aforesaid, duly applied for a division of his said run, and for a pastoral lease of the leasehold area thereof, in accordance with the fourth part of the said Act, and a notification of the division of the said run was duly published in the *Government Gazette*, under the 76th section, on the 11th day of July, 1885. 4. The said conditional purchase was wholly situated within the boundaries of that division or portion of the run which the Minister for Lands determined should be the leasehold area. 5. The said conditional purchase became and was duly declared forfeited by a notification in the said *Gazette* on the 17th day of November, 1885, and thereupon became Crown lands within the meaning of the *Crown Lands Act* of 1884. 6. On the 24th of December, 1885, the defendant applied to conditionally purchase 160 acres, portion of the said forfeited purchase, and for conditional lease of 480 acres, the residue of the said purchase; and the said applications were approved and confirmed by the land board at Forbes, on the 23rd February, 1886. 7. It is admitted for the purposes of this case—subject, however, to the question of law—that the said applications were duly made and subsequently confirmed by the board. 8. The plaintiff contends that the defendant's said applications were invalid, upon the ground that the portions of land applied for were within the leasehold area or division of the said run, and that they were therefore not open for conditional purchase or lease.

The eighth proposition fairly represents the question of law which arises between the parties, viz., whether, when Stewart's purchase of 640 acres became forfeited to the Crown, and again vested in the Crown as Crown lands, that lot of 640 acres was capable of being re-granted by the Crown on conditional purchase and conditional lease. The question is not free from difficulty.

It seems to have been assumed, both in the Court below, and at the Bar here, that it was not necessary to refer to the statutes prior to the Act of 1884, inasmuch as the question of law arises wholly on the construction of a few sections of the Act of 1884.

The conditional purchase by Stewart took place when the prior colonial Act of 1875 (39 Vic. No. 13) was in force; but

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that statute was referred to only for the purpose of pointing out that if the forfeiture had taken place under it, or under *Crown Lands Alienation Act* of 1861, the lands would have returned to the plaintiff as lessee of the run, but subject to a fresh sale by the Crown as provided by those Acts. Their lordships, too, are unembarrassed by the examination of any documents—they have nothing before them but the case stated, and to its limits they are confined.

The *Crown Lands Act* of 1884, an Act to regulate the alienation, occupation, and management of Crown lands, came into force on 1st January, 1885, and it is to be borne in mind that the conditional alienation of 640 acres to Stewart, was then in full force and vested in Stewart, who was, their lordships assume, also in possession. It represented but a small portion of the run, which was stated to include within its external boundaries an area of some 50 square miles. The *Crown Lands Act* of 1884 has been rather severely handled, but though open to considerable criticism it must be in candour admitted that the complicated and conflicting interest it had to deal with rendered such legislation extremely difficult. Mr Justice *Windeyer* has expressed its policy and its object as to the part of it which came immediately under their lordships' consideration in terms which meet their approval.

The statute indicates considerable compromise. The runholders who were possessed of territories under the name of runs were to be dealt with, and if compelled to give up considerable portions of their runs they were compensated by holding the portion which might be allowed to them, under a partial lease by a more certain and continuous tenure, and freed from the interference by purchases absolute or conditional, and from the molestations of selectors.

By the 71st section, "every runholder shall, within 120 days after the commencement of this Act, lodge with the Minister a written application for a pastoral lease, in the prescribed form, of whichever portion of his run may be converted into a leasehold area under this part, and with such application shall furnish a plan of his pastoral holding on the prescribed scale, showing to the best of his knowledge and ability the boundaries

and area of such holding, with all ranges, watercourses, lakes, or other natural features within such boundaries, and shall also mark on such plan the position of all lands held or occupied by him under any tenure other than pastoral lease, and of all improvements upon such holding made by him, or of which he claims to be the owner, and shall furnish in the prescribed form a statement of the average grazing capabilities of the holding, the nature and value of the improvements thereon, together with any other information required by the Minister, and the runholder shall divide by a line or lines the entire area of all Crown lands situated within such pastoral holding into two parts as nearly equal in area as practicable, and after receipt of the plan mentioned the Governor may, by notice in the *Gazette*, reserve temporarily from conditional sale any land within such pastoral holding divided as aforesaid, pending a determination of which part shall be converted into a resumed area."

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Section 72 enables the Minister to require further information from the runholder.

Section 74. "After receipt by the Minister of any application, he shall cause to be marked upon the plan of the pastoral holding all portions of alienated land not already shown thereon within such holding, and shall therefore notify to the runholder which part is to be the resumed area and which the pastoral lease; but the Minister if not satisfied with any proposed division, may require the same to be amended by the runholder until it becomes satisfactory to him, and upon failure of the runholder to make any such provision the Minister may determine the dividing line or lines, and deal with such holding under the provisions in this Act."

Section 76. "When the division of the run shall have been determined by the Minister as hereinbefore provided, a notification thereof shall be published in the *Gazette*, and the runholder shall thereupon become entitled to a pastoral lease of the leasehold area, provided that until the rent thereof be determined he shall continue to pay the same rent as before the division of such runs, and when the rent shall be determined as hereinafter provided, he shall for the time elapsed pay the difference between the rent paid and the rent determined."

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It will be observed that the runholder is bound with his application to furnish to the Minister full information to aid that officer in the performance of his very responsible duties, and that the dividing line which the runholder is bound to make is not of the pastoral holding, but of the Crown lands situated within it. Alienated lands, whether absolutely or conditionally alienated, would not form any part of the Crown lands so to be divided. The Minister has full power to call for further information, and his decision is practically final.

Acting under the provisions contained in these sections, the plaintiff Edols duly applied for a division of his run, and for a pastoral lease of the portion of which might be converted into a leasehold area. The application is not before their lordships, but they assume that it was in the Form 39 given in the schedule to the regulations, and that it was sent in before the 1st of May, 1885. The Minister of Lands, the proper officer appointed for the purpose, and having extensive *quasi-judicial* as well as ministerial powers, dealt with the application, and on the 11th of July, 1885, duly published his decision. That decision is not before their lordships, but they assume that it specified the part which was to be the subject of the pastoral lease, and also defined the resumed area. The function of the Minister was then so far completed and discharged.

The fourth paragraph of the case stated specifies that the conditional purchase (*i.e.*, Stewart's 640 acres) was "wholly situated within the boundaries of that division or portion of the run which the Minister determined should be the leasehold area." This obviously should be interpreted to mean no more than that it was situate within the external boundaries of that portion of the run, but not that it was, or was intended to be, within the pastoral lease. It could not have been lawfully made the subject of the pastoral lease, for it was then alienated land which had been taken out of the run as effectually as if the lease of the run had been so far vacated, and it was then the conditional property in fee of Stewart. It might be afterwards forfeited to the Crown, and become again Crown property. If the 640 acres had been expressly included in the pastoral lease it would so far have been illegal and inoperative. The notice of the forfeiture was not

published until the 17th of November, 1885, and after the lapse of 30 days from that publication, and not before, the forfeiture was complete, and the 640 acres became Crown lands within the meaning of the Act of 1884.

The plaintiff, however, contended that the true view to take of the forfeiture of a conditional purchase was that the land reverted to its former condition as if the conditional purchase had never been entered on or made, and that consequently the 640 acres being locally within the ambit of the leasehold area it reverted and became part of the leasehold. Their lordships cannot adopt this view. There are many and formidable arguments against it, but it is sufficient to say that their lordships can find no language in the Act to warrant them in coming to the conclusion that it reverted to or was brought within the pastoral holding in the sense of forming part of it. There is a provision in the statute, confined, however, to lands held under pre-emptive leases, to the effect that all lands held under pre-emptive lease on 31st December, 1884, shall thereafter be deemed to be Crown lands discharged from such lease, and shall revert to the pastoral holding (if any) of which they originally formed a part, but subject to additional rent.

Their lordships now go back to some earlier provisions of the Act of 1884. The interpretation (s. 4) is one that has given rise to much of the argument, and no doubt it is open to the criticism that the Legislature has occasionally throughout the Act used the defined expressions in a sense different from that provided by the fourth section. But that section expressly guards the interpretation by declaring that the defined meaning is to be adopted "unless the context necessarily requires a different meaning," and their lordships are bound to follow in that respect the mandate of the statute.

The Act deals with Crown lands only, and one of its great objects was to bring all Crown lands within the provisions of one statute and under the control of the Executive. It is observable that there is no reservation expressed of any prerogative rights; section 4 defines Crown lands thus: "Crown lands" means lands vested in Her Majesty, and not permanently dedicated to any public use or granted or lawfully contracted to

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be granted in fee simple under this Act or any of the Acts hereby repealed. And that definition is completed by section 136, which declares that land forfeited under the Act becomes Crown land, and may be dealt with as such. The other definitions to which their lordships desire to refer are—"leasehold area" means that portion of a pastoral holding for which a pastoral lease may be granted under this Act, and "resumed area" means that portion of a pastoral holding for which a pastoral lease may not be granted under this Act.

It was upon these definitions, coupled with section 21 (part 3), sub-section 3, that the principal contest arose in the argument. Clause 21, dealing with alienation, provides that Crown lands belonging to any of the classes thereafter specified shall be exempt from conditional sale. The only exempted class material to this case is—" (3) Lands comprised within leasehold areas notified under the provisions of Part 4."

For the plaintiff it was very vigorously contended that section 21, on its exemption of lands comprised within leasehold areas, should receive a different interpretation from that given to leasehold area in the fourth or definition section, and should be taken to exclude all land within the external boundaries of the local area, though not being a portion of a pastoral holding for which a pastoral lease might be granted—that in effect "area" should be there interpreted as area physically of the pastoral holding, and that all lands within its continuous external boundaries were exempted.

The defendant, on the other hand, contended that "within the leasehold area" was to be read under the definition of section 4, as that which was within it as forming part of it, and of which as such a pastoral lease might be granted.

Their lordships are of opinion that the latter is the correct view, and that there is nothing in the context of section 21 so far which would require a different meaning to be put on "leasehold area" in section 21, sub-section 3, from that given in the interpretation section. "Leasehold area" and "resumed area" are put in contrast, and each apply to some division of the Crown lands in the pastoral holdings. The first is applicable to that portion of the pastoral holding which may be, and the latter to

that which may not be, the subject of a pastoral lease under the Act; but it was asked, is the forfeited land part of the resumed area? The answer ought to be in the affirmative. The run holding, so far as it consisted of Crown lands, was, in all its parts, liable to resumption for the purposes of absolute or conditional sales—and clearly, when a forfeiture took place and the forfeited land reverted to the Crown, it became in the hands of the Crown resumed land and part of the resumed area.

Their lordships have arrived at certain conclusions which govern the decision of the case, and render it unnecessary to notice many other points of difficulty of construction presented in the course of the argument.

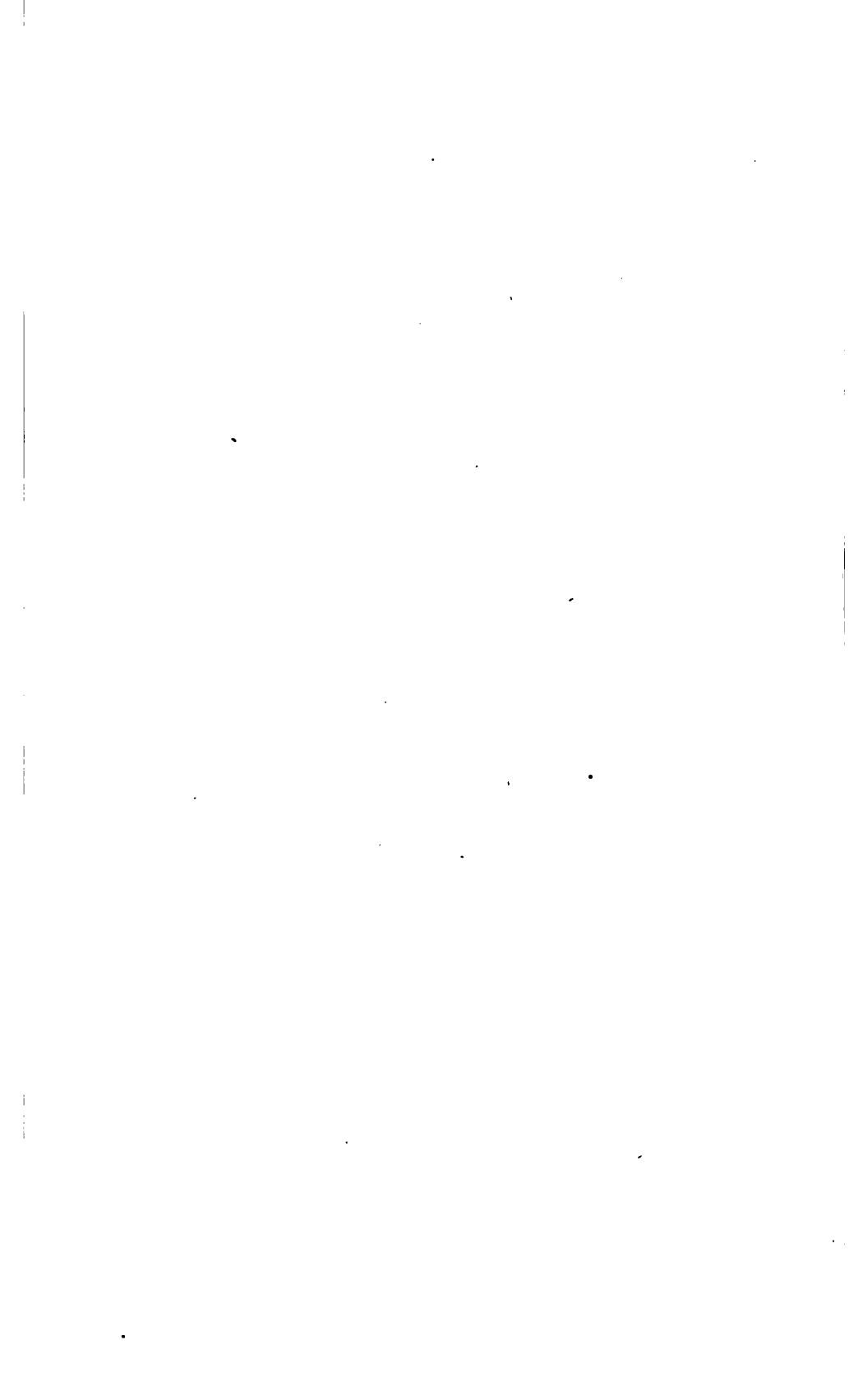
Their lordships are of opinion that Stewart's 640 acres, though within the continuous external boundary of the leasehold area as notified by the Minister, yet did not belong to it, and was not a portion of the pastoral holding of which the Minister might make a pastoral lease, and that on the subsequent forfeiture of Stewart's title the land reverted to the Crown, and became "Crown land" within the definition of that expression in section 4, and part of the resumed area, and was not exempted from conditional sale within the third sub-section of section 21.

Their lordships, in effect, adopt the reasons of the late *Chief Justice* as on the whole the most reasonable, and they are of opinion that the question contained in article 10 of the special case stated—viz., "Whether the defendant's said applications, or either of them, were valid under the circumstances hereinbefore set out?"—should be answered in the affirmative as to both, and that the judgment of the Supreme Court of New South Wales, dated the 10th November, 1886, should be reversed, and a verdict entered for the appellant in terms of article 12 of the said special case. Their lordships will so humbly advise Her Majesty. The respondent is to pay to the appellant the costs of this appeal.

Appeal allowed with costs.

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C A S E S

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

In Equity

BEFORE THE PRIMARY JUDGE

AND THE

FULL COURT ON APPEAL,

IN 1887.

EBERLEIN v. EBERLEIN AND OTHERS.

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Costs—Discretion of Court of Equity not unlimited—Decree varied.

Feb. 21.

ON APPEAL

The Court of Equity has not unlimited discretion as to costs.

E.g.: It cannot deprive a plaintiff, who succeeds in every particular of the claim, of costs, if the defendant has opposed the claim of the plaintiff through-out, unless the plaintiff has been guilty of some grave misconduct.

*Darley, O.J.
Faucett J.
and
Innes J.*

Delay in instituting proceedings when such delay has caused no injury to the defendant, is not sufficient ground to enable the Court to deprive a successful plaintiff of costs.

THIS was an appeal from a decree of *Manning*, P.J., in so far as such decree ordered the plaintiff to pay the costs of suit of her husband, who was the principal defendant. The decree granted everything prayed for in the statement of claim. A large proportion of the costs was incurred in the conduct of a commission applied for by the husband to examine certain witnesses in South Africa, where the husband resided. The evidence so taken was entirely abandoned by defendants' counsel at the hearing.

The object of the suit was to set aside a settlement made by the plaintiff in favour of her husband, on the ground of undue influence exercised by him. The suit was not commenced for 15 years after the execution of the settlement.

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Simpson for the plaintiff in support of the appeal. The ground of the order as to costs seems to be that the Primary Judge considered the plaintiff had been guilty of laches in not commencing the suit earlier. Plaintiff swore that the reason of the delay was her fear that if she commenced the suit her child might be taken from her by her husband. Directly the child died the suit was begun. There are two objections to making the supposed laches of the plaintiff the ground for an order for costs against her.

(1.) There is no case—unless within the *Statute of Limitations*—where mere delay has prejudiced the rights of parties, unless those rights have been altered or fresh rights have been created by the delay, and nothing of the kind has happened in this case. “*Quiescence is not acquiescence.*”

(2.) There could be no laches on the part of the plaintiff, as she was under coverture till after the suit was commenced. It is a settled doctrine that the rule as to acquiescence does not apply to a feme covert.

On the question of the discretion of the Court as to costs, he refers to remarks of *Faucett, J.*, in *Langdon v. Reuss* (1).

Walker for defendant to support the decree. The Primary Judge evidently meant defendant to have his costs out of the settled property, though the form of the decree makes them payable by the plaintiff. It is within the discretion of the Judge to order the costs of the suit to be paid out of the estate. Putting aside the form of the decree that is what he has done here. Should this Court then interfere with the exercise of the Judge's discretion, unless he errs in principle? Where resistance to a suit is justifiable the Court will order costs to be paid out of the estate.

Simpson in reply.

Darley C.J. DARLEY, C.J. I am of opinion that this decree must be varied so far as it relates to costs, and that the defendant Eberlein must pay the costs of the suit. The general principle is laid down by *Jessel, M.R.*, in *Cooper v. Whittingham* (2).

(1) 4 N.S.W. L. R. p. 32.

(2) 15 Ch. D. p. 504.

The question is, does the laches alleged against the plaintiff in this case amount to misconduct within the meaning of the rule there laid down? I am unable to see that it does.

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Shortly after the marriage of the plaintiff and defendant, the plaintiff, in consequence of the ill-treatment she received from her husband, left her home. In the year 1879 the defendant Eberlein went to the Cape of Good Hope, and commenced proceedings against his wife for divorce on the ground of malicious desertion. In 1885 he obtained a divorce, apparently on the ground of the plaintiff not having opposed the suit. I cannot see that the plaintiff has been guilty of any laches which has been injurious to the defendant. The fear of her husband taking her child away from her evidently pressed upon her mind, and caused her to delay these proceedings. If, as the Primary Judge seems to think, the plaintiff's laches ought not to prevent her succeeding in setting aside the settlement, I cannot see how it should interfere with her right, as a successful litigant, to recover her costs of suit. In *Clarke v. Hart* (1), Lord Cranworth lays it down as a general rule that costs ought never to be considered as a penalty or punishment, but as a necessary consequence of a party having created litigation, or occasioned the necessity for litigation, in which he has failed. And in the case of *Foster v. The Great Western Railway Co.* (2), Brett, L.J., and Cotton, L.J., relying on the equity authorities, lay down the same rule. I am unable to see why the plaintiff in this suit, having fully succeeded, should be deprived of costs. I therefore think the decree should be varied so as to give her her costs of suit; she will also be entitled to the costs of this appeal.

FAUCETT, J. The principle as laid down by *Jessel, M.R.*, is quite clear, that unless the plaintiff has been guilty of some misconduct (e.g., putting defendant to unnecessary costs), if he is successful throughout he is entitled to have his costs. Now, can we in the present case depart from the general principle? The evidence given discloses, among other facts, that the plaintiff married the defendant in August, 1870, after articles of agreement for a settlement had been drawn up, and that in October,

Faucett J.

(1) 6 H. L. Cas. p. 687.

(2) 8 Q.B.D. p. 515.

1887. 1870, she was compelled by the defendant to execute a settlement, differing widely from the agreement drawn up before marriage. This suit was brought to set aside that settlement, and to restore the rights the plaintiff had under the articles drawn up before marriage. In that suit her claim was held to be good, and she succeeded throughout. She obtained a benefit, inasmuch as the post-nuptial settlement, which deprived her of benefits she had under the ante-nuptial agreement, was set aside. How was she deprived of her rights in the first instance? By the misconduct of her husband, who was in the wrong from the commencement. In her claim the plaintiff necessarily charges the defendant with coercion, and that claim succeeded in every particular. The defendant made use of the commission, which was issued at his instance, to make charges against his wife which were totally unsupported, and which his counsel withdrew at the hearing; and, by taking advantage of the state of the law at the Cape of Good Hope, obtained a divorce from his wife, who had never been in that colony. On what grounds, then, is the defendant entitled to our consideration, or what entitles him to be reimbursed his costs, in a suit which he has throughout opposed? It seems likely that the question of laches weighed on the mind of the Primary Judge, and that he thought the plaintiff should have brought her suit in England, to avoid putting the defendant to unnecessary expense and inconvenience. But even if the plaintiff's conduct in those respects amounted to misconduct, the Court could do no more than deprive her of her costs. The delay was caused through the plaintiff's fear that the defendant would interfere with her child, and was owing to the misconduct of the defendant, not of the plaintiff, who can only be deprived of costs on the ground of her misconduct. I am of opinion, therefore, the decree should be varied as his Honour the Chief Justice suggests.

Innes J. SIR GEO. INNES, J. I entirely concur in the conclusions at which their Honours have arrived. I might refer to a passage in *Foster v. The Great Western Railway Co.* (1), which runs as follows:—"It is true that now the costs of an action tried

without a jury are in the discretion of the Court; but the practice of the Court of Chancery must be followed, and according to that practice the Court could not give costs against the successful party, but was at liberty to withhold the payment of costs to him."

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Innes J.

Appeal allowed with costs.

Solicitor for appellant: *Meyer.*

Solicitors for respondents: *Allen & Allen.*

SACHS v. BEAUMONT.

Feb. 22, 23.

Mortgagor and mortgagee—Common law remedies of mortgagee—Compulsory sequestration of mortgagor's estate on unsatisfied judgment—Injunction—5 Vic. No. 17, s. 39.

ON APPEAL.

Darley C.J.
Fauccett J.
and
Innes J.

A Court of Equity has no power to restrain a mortgagee from exercising all his remedies at law and in equity at the same time. The sale of mortgaged property under the mortgagee's power of sale having been frustrated by the misconduct of the mortgagor, the mortgagee sued on the covenant for payment, obtained judgment for the whole amount of the mortgage debt and interest, and issued execution. The mortgagor failed to point out to the bailiff charged with the execution of the writ of *fi. fa.* any disposable property except the equity of redemption, for which, on its being put up for sale by the sheriff, no bid was made. The mortgagee thereupon filed a petition in insolvency, and obtained an order *nisi* for the sequestration of the mortgagor's estate, on the ground that the mortgagor had not pointed out sufficient disposable property to satisfy the said judgment debt. The mortgagor then commenced a suit in equity to restrain the mortgagee from further prosecuting the said petition in insolvency.

Held, that the mortgagor had disclosed no equity to justify the issuing of the injunction; and that, as there had been no misconduct or fraud on the part of the mortgagee, the Court of Equity could not interfere to restrain the exercise of his legal remedies.

Held, also, that, under 5 Vic. No. 17, s. 39, a mortgagee, as a secured creditor, can prove in insolvency for the whole amount of his debt and interest, and is not limited to proving for the unsecured balance.

THIS was an appeal from an order of *Manning*, P.J., refusing to dissolve an injunction granted *ex parte*, restraining the defendant from further proceeding with a petition in insolvency,

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which he had filed against the plaintiff, under circumstances which sufficiently appear from their Honours' judgments.

The grounds of appeal were: 1. That the plaintiff, on his application for the injunction, suppressed the material facts—(a) That the agent referred to in the plaintiff's affidavit, as employed by him to protect his interest to the extent of 17,000*l.*, on the attempted sale of the mortgaged premises by the defendant, was only a clerk of the plaintiff, and wholly without means; and (b) that the plaintiff, when he authorised the said agent to bid, knew that the money bid could not be paid, and that even the cheque for the deposit would be dishonoured; and (c) that the equity of redemption of the said mortgaged premises had, since the attempted sale and prior to the said injunction motion, been offered for sale by the sheriff and no bid made therefor.

2. That the object of the plaintiff in deputing the said agent to bid was simply to render nugatory the mortgagee's power of sale, and that a Court of Equity will not allow a mortgagor by such a course of action to interfere with the clear right of a mortgagee acting *bonâ fide*, or allow the mortgagor to dictate when or how the mortgagee shall sell under his power.

3. That the defendant mortgagee having been, by the said action of the mortgagor, deprived of the proper exercise of his power of sale, was strictly within his legal and equitable rights in attempting to enforce his rights through the Insolvent Court, and that such Court was and is the proper forum to decide the question of fact as to whether the plaintiff had pointed out sufficient available assets to the proper officer, making the demand within the 17th section of the *Insolvency Act*, 5 Vic. No. 17.

4. That the plaintiff, while insisting that the mortgaged premises exceed the mortgage debt in value, does not by the statement of claim filed herein, make any offer to redeem, with the alternative of foreclosure without the usual period elapsing, if such redemption were not carried out.

5. That the effect of the order of his Honour, refusing to dissolve the injunction granted herein and now being appealed from, is practically to deprive the defendant mortgagee of his power of sale under the mortgage deed, and of proceeding to enforce the judgment obtained for the mortgage debt, and to

drive him, as a last resource, to file a foreclosure suit against a possibly insolvent mortgagor to obtain his rights.

The statement of claim set out the facts of the mortgage for 12,500*l.*, with interest at 9 per cent. ; the default by the plaintiff ; that, after advertisement by the defendant, the said lands were put up for sale by auction on the 27th of August, and were bought for the sum of 17,000*l.*, or thereabouts, but the sale was not completed. It was also admitted that defendant recovered judgment for 13,774*l.* 2*s.* 5*d.* for breach of covenant, in non-payment of principal and interest, and that he had filed his petition and obtained an order *nisi* for the sequestration of plaintiff's estate, and the 8th paragraph charged "that defendant holds sufficient disposable property of plaintiff to satisfy the said judgment debt, and that he ought to be restrained from taking any steps for the sequestration of the estate of the plaintiff."

Prayer : That the defendant may be restrained from further prosecuting the said petition in insolvency.

From an affidavit by plaintiff, it appeared that he had obtained a further advance of 1900*l.* on the said land by way of second mortgage from Messrs. Batt, Rodd and Purves, and that that firm had received an offer of 19,000*l.* for the land in August, 1886.

As to the value of the land, it appeared from affidavits filed by the plaintiff that Mr. Mills, of Messrs. Mills and Pile, had valued it at 15,500*l.* ; and that Mr. H. Gorman, of Messrs. Hardie and Gorman, valued it at 15,000*l.* ; while, from an affidavit filed by defendant, it appeared that Mr. Gregg, of Messrs. Richardson and Wrench, valued it at 12,825*l.*

G. Knox took the preliminary objection that in the notice of appeal grounds were taken which were not raised in the Court below.

Walker. An appellant in equity is not confined like an applicant for a prohibition to the points raised in the Court below. An equity appeal is in the nature of a re-hearing. Besides, all the points were substantially, if not expressly raised, as they all appear on the affidavits which were read below. Even if it were not so, the case, on appeal, so long as it is not inconsistent with the case below, may always be strengthened by fresh arguments and new points.

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G. Knox. The fourth ground goes into entirely new matter.

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DARLEY, C.J. Suppose we saw reason for revising a decree on some ground that was not raised below, should we be bound to uphold the decree? We think there is nothing in the objection.

Walker (Browning with him), in support of the appeal. There is no equity disclosed in the statement of claim, to give the Court jurisdiction to grant an injunction to restrain these insolvency proceedings. It is suggested that the property is worth 17,000*l.*; if so, why does not the plaintiff raise the money to pay off the debt?

[*Knox* admits there has been an act of insolvency.]

Even supposing there is any equity, the Court of Insolvency is a Court of Equity, and cannot be restrained by the injunction of another Court of Equity.

By 25 Vic. No. 8, s. 4, "The Chief Commissioner of Insolvent Estates, sitting in insolvency, shall have all the authority and powers of a Judge of a Court of Record, and the powers and jurisdiction now vested in and exercised by the Supreme Court or any Judge thereof, in or in respect of certain matters of insolvency, that is to say: The sequestration of estates, the release of estates from sequestration . . . shall be and the same are hereby transferred to and vested in the Chief Commissioner of Insolvent Estates."

By 38 Vic. No. 1, s. 1, "The insolvency jurisdiction of the Supreme Court, or of a Judge thereof, shall continue to be exercised as a superior Court of Record of Law and Equity, and the orders in such jurisdiction shall have the same force as if they were judgments at law or decrees in equity of the said Supreme Court, and such, &c., &c."

[DARLEY, C.J. We are quite agreed that a mortgagee can sue on the covenant and issue execution. Is there any case in which a Court of Equity has interfered?]

No. It is elementary law that a mortgagee can exercise his legal right if the mortgagor does not offer to pay the debt. In

Everett v. Bayliss (1), it is laid down by *Martin*, C.J., at p. 70, "that a mortgagee may employ every possible remedy given him by his contract, and put them all in motion at the same time, and that there is no discretion, in the absence of fraud or some such special circumstance, that enables the Court to restrain a mortgagee from using his power of sale, or right to foreclose, or from suing on the covenant to pay, or from bringing ejectment." The general rule, as laid down in *Hickson v. Darlow* (2), is that a sale by the mortgagee will be restrained only on payment into Court by the mortgagor of the amount which the mortgagee swears to be due to him; and the same rule is recognised in *McLeod v. Jones* (3). The mortgagee cannot sell if the mortgagor obstructs the sale.

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As to the value of the land, the plaintiff contracted to sell the fee for 14,500*l.*; and there was no bid for the equity of redemption.

As to the first ground of appeal, it is for the Court to say whether the defendant has established his position, namely: 'That the plaintiff suppressed a material fact when he represented M. as his agent, when in truth he was his clerk. In *Kerr on Injunctions*, 2nd Ed., at p. 562, it is laid down that where an injunction has been obtained on a *suggestio falsi* or a *suppressio veri*, the Court will set it aside without going into the merits.

G. Knox for the respondent (mortgagor). The defendant, being mortgagee, has full control over the property mortgaged, and can protect himself without proceeding in insolvency.

[DARLEY, C.J. Must not the petitioning creditor, who holds security, show that there is a balance due to him over and above the secured debt?]

[FAUCETT, J. How can the mortgagor say that he has no disposable property?]

Because he has nothing disposable except the equity of redemption.

If some other creditor had sought to make the plaintiff insolvent, and his debt could not be satisfied by the equity of

(1) 2 N.S.W. L.R. Eq. 66.

(2) 23 Ch. Div. 690.

(3) 24 Ch. Div. 289.

1887. redemption, clearly the rule would have to be made absolute.
SACHS But it is different where a mortgagee is the petitioning creditor.
v.
BEAUMONT. Is it not grossly unfair for a mortgagee to say, I will not realise
my security (which is amply sufficient to pay the mortgage debt),
but I will make you insolvent ?

[DARLEY, C.J. Is not that begging the question ?]

It is absurd that a creditor should make his debtor insolvent for 14,000*l.* on proof of a debt of 300*l.* Section 16 of the English *Bankruptcy Act* of 1869 was passed to prevent this very thing. Though our *Insolvency Act* does not provide for it, the Court of Equity can interfere.

[DARLEY, C.J. Unless the mortgagee can pursue his judgment, the remedy on the covenant is useless.]

The intention of the *Insolvency Act* is that a man cannot be made insolvent unless his debts cannot be satisfied out of his property. The question here, therefore, is, had not the debtor sufficient disposable property ? If the creditor can, of his own act, make property of his debtor disposable, he cannot make him insolvent.

[Walker refers to s. 39 of 5 Vic. No. 17.]

As to the value of the property, our evidence shows that the property is worth more than the whole amount of the debt and interest.

[DARLEY, C.J. Would not that objection be properly taken in the Insolvency Court ?]

No. The Insolvent Court could not go behind the judgment. An act of insolvency was undoubtedly committed, but because we could not succeed in the Insolvent Court we came into equity.

Walker was not called upon to reply.

DARLEY, C.J. I am of opinion that the injunction must be dissolved. I am very loth to interfere with the decision of so experienced a Judge as his Honour *Sir William Manning* ; but in this case I confess I cannot see the equity on which the Primary Judge has grounded his decision. The facts of the case are very simple, and not at all unusual. It appears that previous to the 7th of August, 1885, the plaintiff had a contract with the defendant for the sale to the defendant of certain land at the corner of Pitt and Reiby streets, for the sum of 14,500*l*. This contract went off, and thereupon the plaintiff, on the 7th of August, 1885, executed a mortgage to the defendant of the land in question, to secure the repayment of a loan of 12,500*l*., with interest at 9 per cent. The mortgage was for one year certain. Some time previous to August, 1886, the defendant wrote to the plaintiff informing him that he would require his money to be paid at the due date of the mortgage, and the plaintiff wrote back to say that he would be prepared to pay it. So matters went on till the money became due. The money was not paid. That being so, on the 27th of August the property was put up for sale by the defendant's instructions. The sale took place, but was frustrated by the plaintiff. It will be observed that before the loan was effected the plaintiff had offered to sell the fee simple to the defendant for 14,500*l*. Then, a year afterwards, no suggestion being made that the land had increased in value to that extent in the interim, he instructs his clerk to attend the sale—unknown apparently to the auctioneer, and unknown to the defendant—and to bid to upwards of 16,000*l*. This clerk accordingly did attend, and bid up to 16,750*l*., and the land was knocked down to him. He gave a cheque for 4187*l*. 10*s*., which was dishonoured, his account having been opened on that very day by the payment of 7*l*. It appears to me that this was a deliberate and planned attempt on the part of the plaintiff to frustrate the sale. It is said that a *bonâ fide* bid of 16,500*l*. was made for the land, and that would have been an advantageous sale for all parties ; nevertheless, the price was run up by this clerk of the mortgagor, and by his instructions, far beyond the utmost value of the land, and thus the sale fell through.

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The mortgagee's remedy to recover his advance by the sale of the mortgaged property being frustrated, the defendant exercised another power which he had under the mortgage—that of suing on the covenant contained in the mortgage, and he recovered judgment for 13,774*l.* 2*s.* 5*d.*, and issued a writ of *fi. fa.* The plaintiff does not appear to have pointed out any disposable property to the bailiff, except his equity of redemption in this land. The sheriff then put up the equity of redemption for sale, and there was no bid for it. That being so, what was the defendant to do? The sale having been frustrated, the only other remedy existing at the moment was to obtain a judgment for the amount of the debt. I think he was perfectly entitled to do what he did—i.e., to file a petition in the Insolvent Court. S. 39 of the *Insolvency Act* (5 Vic. No. 17) recognises the right of a secured creditor to be the petitioning creditor.

Now, let us see what the equity is which is charged in the statement of claim. It is “that the defendant holds sufficient disposable property to satisfy the said judgment, and ought to be restrained from taking steps for the sequestration of the plaintiff's estate.” It does not appear to me that there is any equity whatever disclosed. If there is, then this bill, as pointed out by Mr. Justice *Innes*, stands on far higher ground than a bill for redemption. Suppose this had been a bill for redemption, asking, at the same time, for the injunction asked for here, to restrain a proceeding in the Insolvent Court, what would a Court of Equity require? It would require the plaintiff to bring into Court, to the credit of the cause, the amount due on the mortgage. Of course, if that had been brought in, there would have been an end of the whole matter—of the insolvency, and, probably, of the suit. But no such step being taken—without any prayer for redemption—without any offer or wish to redeem—the same object is to be gained, and the defendant is to be deprived of all legal remedy for the recovery of the money admittedly due to him, being left to the tedious and expensive process of filing a bill for the foreclosure of the mortgage, the probability being that, by the time a decree is made in such a suit, the land mortgaged will not be nearly worth the amount which will then be due for principal and interest. In *Lloyd v.*

Vickery (1) *Sir James Martin*, C.J., says:—"A mortgagee is entitled to exercise all his rights to reimburse himself under the mortgage, and there is no equity that can prevent him, until he is paid or a tender of payment is made to him. Lloyd admits the existence of a mortgage, and that about 100,000*l.* are due upon it. Such admission necessarily includes the admission of a right in *Vickery* to sell, whenever he thinks fit, and yet this admitted and undoubted right is interfered with by this injunction, and the exercise of it postponed indefinitely, it may be for years, until the question is determined whether or not the conveyance of the equity of redemption is to be set aside." Every word of this is applicable to the present case. It might be otherwise if there were any allegation that the defendant was improperly putting the Insolvent Court in motion. But it does not appear that the defendant is putting in force remedies not allowed by law, or, that being allowed, he is putting them in force in an oppressive or illegal manner. The appeal must be allowed, with costs, and the injunction dissolved, with costs.

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Darley C.J.

FAUCETT, J. I concur. I have listened very carefully to the arguments of Mr. *Knox*, who has undoubtedly said everything that could be said on behalf of the mortgagor. It is quite clear that a mortgagee has a perfect right to pursue his remedies at law and in equity at the same time. If he sues for a foreclosure, or on the covenant to pay, the Court of Equity cannot restrain him. If he chooses to pursue all his remedies at once the Court of Equity will not say: You must elect which remedy you will pursue. We are called upon, it seems to me, to interfere with one of the clear rights given in the mortgage deed by the mortgagor to the mortgagee. The mortgagee might have sold under the power of sale; and he attempted to do so, but failed, really owing to the misconduct of the plaintiff himself, for it is impossible to say that the clerk, *Morrissey*, was not sent by the plaintiff to prevent the sale. Having rendered that sale nugatory, the plaintiff is now trying to take advantage of his own misconduct in order to prevent the defendant from pursuing any other remedies that the mortgage secures to him. The

Faucett J.

1887. mortgagee has a right, which is clearly acknowledged in Equity, to sue at law for the amount of his debt. He gets his judgment for the debt, it being admitted that the plaintiff here submitted to that judgment by not disputing it. It is not contended that the Court should have only directed a verdict for the difference between the value of the security and the amount of the debt, and should have given judgment for that balance. But Mr. *Knox* says that the defendant can proceed in the Insolvent Court only as to 300*l.*, the amount of the difference or balance.

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Faucett J.

What does the mortgagee then do? He files a petition in insolvency for compulsory sequestration of the mortgagor's estate, and in his affidavit states that he holds security for 12,000*l.*, showing at the Insolvent Court, as he was bound to do, that his real debt was only 300*l.* We are told that this involves hardship, as the mortgagor ought to have been made insolvent for 300*l.* only. Is there anything wrong in that—in pursuing his legal rights under the mortgage deed? I cannot see anything wrong in it. We are now called upon to say that this mortgagee shall be deprived of one of his rights—of his right to sue at law; or, in other words, to stop him at a certain point, because we, as a Court of Equity, might think that the mortgagor has been subjected to harsh treatment. All I can say is that this Court, as a Court of Equity, does not think so. If this injunction were allowed to stand, the defendant would be absolutely deprived of the remedy which he has at law. This is a suit, not for redemption, but simply to restrain the defendant from exercising a common law right. Some cases have been referred to, and among others that of *Lloyd v. Vickery* (1). No one can question the statement of his Honour the late Chief Justice, at p. 35. The other Judges in that case never disputed the law laid down by his Honour, though they dissented on the facts. Even if there had been any dispute as to the law in that case, it has been laid down by English Judges over and over again in the same words as those of the late Chief Justice.

Innes J.

SIR G. INNES, J. I do not wish to add anything to what has fallen from their Honours, in whose reasoning I entirely concur,

(1) 12 S.C.R. Eq. p. 5.

as well as in the conclusion at which they have arrived, beyond stating that I am sure his Honour the Primary Judge was only actuated by that anxious desire which he always most properly evinces to check anything that appears to him to be a harsh or oppressive exercise of legal rights. To this Court, however, it appears that the conduct of the appellant here has not been in any way blameworthy, and that there are no circumstances of misconduct which would justify a Court of Equity in restraining the mortgagee from fairly and legitimately pursuing his legal remedies.

Appeal upheld ; injunction dissolved, with costs.

Solicitors for appellant : *Macnamara & Norton.*

Solicitors for respondent : *Stephen, Laurence & Jaques.*

Re HORDERN'S WILL.

P. J.

Testamentary guardian—Marriage of female infant ward — Guardianship not determined.

1887.

March 4.

By his will, testator appointed his wife as guardian of his infant children during her widowhood, and devised to his daughter C., for her separate use, certain lands, giving the trustees of his said will discretion to apply the whole, or any part, of the income arising from the shares devised to the children, to their maintenance respectively during infancy.

C., while still an infant, married, her husband being also an infant.

Held, that C.'s marriage did not determine the guardianship of her mother, and that her mother could consequently give the trustees a good receipt for any moneys paid by them for the support of C.

This was a petition by the trustees of the will under the circumstances stated in the head-note, for the advice of the Court as to who was the proper person to give them a receipt for money paid by them for the support of C. There was also a question as to what sum should be allowed to C., her husband being almost entirely without means.

G. Knox, for the trustees of the will. We merely desire to be relieved from having to see to the application of any money we may pay for C.'s maintenance,

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Re
HORDERN'S
WILL.

Street for the cestui que trust, C. The mother's guardianship is not determined by the marriage of the ward while still an infant.

In *Mendes v. Mendes* (1), it is laid down that if guardianship be created by a devise, it lasts till the ward comes of age, and in *Roach v. Garvan* (2), that the Court will not determine a guardianship or discharge an order made for a guardian because of marriage. In *Bacon's Abridgment—tit. guardian—E.*, it is laid down that, "if a female infant who is in ward marries, at common law the guardianship is determined, because the husband, immediately on the marriage, becomes her guardian." That rule, however, cannot apply here, as the husband is also an infant. He also refers to *Simpson on Infants*, p. 204.

Manning, P.J. SIR W. M. MANNING, P.J. I am of opinion that a guardian appointed by such a clause as there is in this will, remains in that position till the ward attains the age of 21 years, and that the guardianship is not determined by marriage during infancy. The proper course for the trustees, therefore, is to pay the money, which it is in their discretion to apply for the infant's maintenance, to her mother, who, as guardian, is competent to give them a good receipt for any money so paid.

To avoid any difficulty in future, however, I order that the receipt of the mother shall be a good discharge to the trustees.

Solicitor for petitioners : *Colyer*.

Solicitor for cestui que trust : *Dowling*.

NOTE.—In *Connolly v. Farrell* (3), it was held, that under a trust for the maintenance and support of the daughter during her minority, the widow's guardianship did not cease upon the daughter's marriage under age.

See also *Camden v. Benson* (4), cited in the above case.

(1) 1 Ves. 91.

(2) 1 Ves. 160.

(3) 8 Beav. 347.

(4) Cor. Pepsy. M.R. 13 Aug. 1835.

MUNRO & OTHERS v. COOK.

P. J.

Will—Estate of executors—Implied power of sale—Direction to invest.

1887.

Testator by his will gave his estate, including freehold, conditionally purchased, and leasehold lands, sheep, farm implements, and money to his widow and children in thirteen aliquot shares, and directed some of such shares to be invested in Government debentures or bank securities, for his daughters' sole use on their attaining the age of twenty-five years.

Held, that, notwithstanding a direction in the will that two specific properties were not to be sold, the executor had an implied power to sell the said properties when the period of distribution arrived, and that the direction applied only to an immediate sale.

SPECIAL CASE. 1. Donald Munro, by his will, dated the 6th day of October, 1886, after directing the payment of all his just debts, funeral and testamentary expenses, bequeathed certain pecuniary legacies and an annuity not material to be herein set forth, and gave, devised and bequeathed the remainder and residue of all his real and personal estate to his wife and family, in manner thereafter stated, that is to say: That the property should be divided into thirteen equal shares, two shares of which he bequeathed to his widow, the plaintiff, Margaret Munro, two shares to his son, the plaintiff, Alexander George Forbes Munro, and the other shares one to each other member of his family, and the said testator directed that each of his sons should receive his share on attaining the age of twenty-five years, and should be allowed interest on his share on attaining the age of twenty-one years, providing that they should start in business before the age of twenty-five years, and that none of his sons' shares should bear interest until they should attain the age of twenty-one years, and then only as provided for; and the said testator directed that his daughters should have their shares invested in Government debentures or bank securities for their own sole and special use and benefit on attaining the age of twenty-five years, and that they should then only receive the interest thereof, and that should they marry, their respective husbands should not have any power or control over the legacy then bequeathed to his daughters. And the said testator further declared that his daughters should only receive

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the interest of the legacy during their lifetime, and that on their death the legacy should be equally divided among their children on their attaining the age of twenty-one years, or at a younger age if it should be necessary for their education, and that the legacy bequeathed to each daughter was only to be divided amongst her own children; and that if any of his daughters should die without issue, should she have been married, she should be at liberty to bequeath the legacy to whom she should please, provided it did not interfere with any former provision of his said will; and the said testator further directed that if any female member of his family should die before attaining the age of twenty-one or unmarried, her portion or share should be equally divided between the male and female members of his family, and that if any male member of his family should die before attaining the age of twenty-one, or unmarried before attaining the age of twenty-five years, his portion or share should be equally divided amongst the surviving male and female members of his family, and the said will also contained this clause:—
“All my property, except the Tamworth Flour Mills and the Keera Station to be sold. Should the Tamworth Flour Mill be not rented, it can also be sold, together with the other property, and the money realised thereby to be invested in the purchase of a fattening station, or be invested as the executors in their wisdom may see fit;” and the said testator appointed the plaintiffs, executrix and executors of his said will. The said will is to be considered as set forth at full length in this case, and to be incorporated therewith, and either party shall be at liberty to refer to any of its provisions.

2. The testator died on the 6th day of October, 1886, leaving him surviving his widow, the plaintiff, Margaret Munro, and ten children, and the said will was duly proved by the plaintiffs.

3. Donald Munro, the youngest son, died at the age of fifteen years, unmarried.

4. All the living children of the said testator have attained the age of 25 years, and two of his daughters are married and have children who are infants under the age of twenty-one years.

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5. Some years ago, a valuation was made of the Keera Station, property of the said testator, and the estimated shares of the daughters of the said testator were paid out of moneys in the hands of the plaintiffs, belonging to the said estate, and were invested in a manner directed by the said will.

6. The plaintiffs have recently sold the said Keera Station, consisting of nine hundred and twenty acres, more or less, of freehold land, one hundred and sixty acres, more or less, of conditionally purchased lands, and one hundred and fifty-two thousand acres, more or less, held under lease or promise of lease from the Crown, with the sheep, cattle and horses depasturing thereon to the defendant. The contract for sale of the said station is to be considered as set forth at length in this special case, and as incorporated therewith.

7. Certain portions of the freehold lands, forming part of the said station, are under the provisions of the *Real Property Act*.

8. The defendant has taken certain objections to the title of the plaintiffs to the said lands, on the grounds that the plaintiffs are, by the said will, prohibited from selling the said station, and that the legal estate in the said lands is not vested in the plaintiffs, and that the plaintiffs cannot, under the provisions of the *Real Property Act*, become registered as proprietors of the lands subject to the provisions of such Act, so as to be entitled to transfer the said lands, and that the plaintiffs are not entitled to a certificate from the Crown Solicitor that they have power to transfer the said leasehold lands.

9. The widow and all the children of the said testator are willing to join in a conveyance and transfer of the said station to the defendant.

The questions for the opinion of this honourable Court are as follows:—1. Whether the plaintiffs, as such executors as aforesaid, have power to sell and convey the said Keera Station and the freehold lands forming part thereof, without the concurrence of any other person.

2. Whether the plaintiffs are entitled to be registered under the provisions of the *Real Property Act* as proprietors, by

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transmission of the lands subject to the provisions of such Act, and to transfer the said lands to the defendant.

3. Whether the plaintiffs are entitled to a certificate from the Crown Solicitor that they are the proper persons to transfer the said leasehold lands to the defendant.

4. Whether (if the above questions are answered in the negative) the plaintiffs and all the surviving children of the said testator can convey and transfer to the defendant, or procure a valid conveyance and transfer to be made to the defendant of the said freehold and leasehold lands.

5. Whether, in any event, the defendant will be bound to see to the application of the purchase money.

G. Knox for the plaintiffs. As regards the daughters' shares, at any rate, they are converted into personalty by the direction in the will to invest those shares; and as the executors are pointed out by the will as the proper persons to invest the money, they have an implied power of sale over the daughters' shares. Further, there is an implied trust for sale of the whole property when the period of distribution arrives, the prohibition as to the sale of the mill and station only applying to an immediate sale; and, as the proceeds of the sale are to be applied by the executors, there is an implied trust for sale in them which overrules the earlier provision in the will prohibiting the sale. All the directions to sell apply to an immediate sale, so the prohibition should also apply only to an immediate sale. *Mower v. Orr* (1) is a case of exactly the same nature, and if we follow that case there is a power to sell the whole estate when the period of distribution arrives, which is uncontrolled by the prohibitory clause in the will. If we follow the decision in *Cornick v. Pearce* (2), which does not go so far as the last case, there is still a conversion of the daughters' shares. By limiting the prohibition to an immediate sale, the whole will is rendered consistent and intelligible.

[MANNING, P.J. The will places realty and personalty in the same category, and that seems to indicate that the testator meant the executors to have power to sell.]

(1) 7 Hare 475.

(2) 7 Hare 477

The following cases were also cited in the course of the arguments :—*Tylden v. Hyde* (1), and *Warnford v. Thompson* (2).

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Gordon, for the defendant, submits to any opinion the Court may express.

SIR W. M. MANNING, P.J. I think in this case the executors *Manning, P.J* may sell without the concurrence of the testator's sons and daughters. It would be practically impossible to give effect to the provision in the will that the mill and station should not be sold, as the whole property, personal as well as real, has to be divided into a number of shares and distributed, and no division could take place unless the whole property were realised. As in *Cornick v. Pearce* (3), there is a direction to invest certain shares, and so far as those shares are concerned, there is an implied conversion of the real estate. I have no doubt that the testator, in appointing the plaintiffs executors of his will, meant that they should act as trustees under the will, and that he intended them to have power to do everything necessary to carry into effect the disposition of his property which he made by the will. There would have been no doubt or difficulty in this case but for the clause of the will prohibiting the sale of the flour-mill and the Keera Station, and as the prohibition is not expressed to last for any definite term this clause must be explained reasonably, so as to conform with the general meaning of the will. It seems to me reasonable to suppose that the testator meant that these properties were not to be sold immediately, but were to be kept till the youngest child should attain the age of 25 years. I therefore think that the prohibitory clause must give way, and that the plaintiffs, as executors, have power to sell, and pass the legal estate in, the freeholds; in fact, that they have power to dispose of the whole estate, as there can be no division into shares, and distribution of those shares, until the whole estate is realised. I accordingly answer the first three questions in the affirmative, and the fifth in the negative. The fourth requires no answer.

Solicitors for the plaintiffs: *John Dawson & Son*.

Solicitor for defendant: *W. H. Pigott*.

P. J.

Re THE COMMISSIONER FOR RAILWAYS

AND

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THE TRUSTEES OF ST. BARNABAS' CHURCH, BATHURST.

Resumption—Payment of compensation money into Court—Particular object of trust fulfilled—Payment out—Cy. prés.

A conveyance of certain land having been made for the purpose of building a church thereon, the church was built on part of the land. Another part of the land which would have been suitable for a parsonage was resumed by the Commissioner for Railways, who paid the compensation money into Court. The trustees applied for the money to be paid out, to enable them to pay for certain land which they had agreed to purchase as a site for a parsonage in connection with the church, and to erect a parsonage thereon. The church at the time of the application was complete and in good repair.

Held, that as it was impossible to apply the money in strict conformity with the terms of the trust, the Court had power to order the money to be expended on an object connected with the object of the trust.

THIS was a petition by the trustees of St. Barnabas' Church, Bathurst, for the payment out of Court of money paid in by the Commissioner for Railways as compensation for land resumed by him. The facts sufficiently appear from the petition, of which the material clauses were :—

3. By an indenture, bearing date the sixteenth day of November, 1878, and made between Francis Lord, of the one part, the Reverend Thomas Smith, Thomas Martin Sloman, John Findlater Clements, Benjamin Richard Cutler, and George Pinnock, trustees for the purposes thereafter mentioned, of the other part, the lands and hereditaments therein described, being portions of the lands comprised in the said grants, were granted and released unto the said trustees, their heirs and assigns, for ever, as joint tenants, upon trust, for the church erected thereon, known as St. Barnabas' Church, in connection with the Church of England, and according to the provisions of the Act, 8 Will iv. No. 5.

4. The said Thomas Martin Sloman, Benjamin Richard Cutler and Geo. Pinnock are the present trustees of the said church, known as St. Barnabas' Church.

5. The Commissioner for Railways being desirous of purchasing portion of the lands comprised in the said indenture,

for the purpose of providing additional accommodation in connection with the Great Western Railway extension from Penrith to Bathurst, gave notice in writing that he had taken, as a portion of the land required for an extension of the railway from Penrith to Bathurst, the lands and hereditaments described in the schedule of land annexed to his petition herein.

8. Under and by virtue of an order of this honourable Court, made herein, the Commissioner for Railways aforesaid caused to be paid into the hands of the Master in Equity of this honourable Court, the sum of four hundred and sixty-two pounds to the credit of this matter, as purchase money for the said land.

9. The lands so resumed by the said Commissioner for Railways, as aforesaid, include no part of the site of the said church of St. Barnabas.

10. In the month of December, 1884, the Rev. Canon Dalrymple, incumbent of the church of St. Barnabas, for and on behalf of the above-mentioned trustees, agreed to purchase, for the sum of three hundred pounds, from Messrs. Clements and M'Carthy, as the agents for the vendors, allotments one and two, and twenty-two and twenty-three, of a subdivision of section one hundred and sixteen, in the parish and town of Bathurst, and part of the money agreed to be paid was then paid as deposit, the balance being secured by a bill, bearing interest, signed by the said Rev. Canon Dalrymple and the said Benjamin Richard Cutler.

11. The said lands were agreed to be purchased, as aforesaid, by the said Canon Dalrymple for the express purpose of erecting a parsonage in connection with St. Barnabas' Church aforesaid, and for the dwelling-house of the clergyman duly licensed to officiate in the said church.

12. The trustees are desirous of proceeding with the erection of the said parsonage as expeditiously as possible, and the work is at present stopped owing to want of money for that purpose.

Prayer :—That the sum of four hundred and sixty-two pounds, now in the hands of the Master in Equity of this honourable Court, to the credit of this matter, be paid to the above-named

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1887. trustees, to be applied in the payment of the balance due in respect of the purchase of the lands aforesaid, and the erection or completion of the said parsonage thereon.

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An affidavit in support of the petition stated that the church had been completed and was in good repair, and that there was no need to expend money on it.

G. Knox, for the trustees, in support of the petition.

Simpson, for the Commissioner for Railways, offered no opposition.

Manning, P.J. SIR W. M. MANNING, P.J. I am of opinion that the prayer of the petitioners should be granted, and the money paid out of Court for the purpose of paying for the land, and erecting a parsonage, as prayed. It is not possible to apply the money in strict conformity with the terms of the trust, as the church has been built and is in good repair, so the only course appears to be to apply it in furthering the object for which the land was conveyed, and thus carrying out, as nearly as possible, the intentions of the trust. The trustees had no option as to disposing of the land, and as the land has been taken on which a suitable parsonage might have been built, I can see no better way of applying the money than in the purchase of land for a parsonage and the erection of the parsonage. It is impossible that the money should be allowed to lie idle, so I order that it be paid out in accordance with the terms of the prayer.

Solicitors for the trustees : *Curtiss & Barry*.

Solicitor for the Commissioner : *Williams, C.S.*

WATSON v. KERRIDGE AND WIFE.

P. J.

Will—Mental incapacity—Undue influence—Circumstantial evidence.

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The Court can infer undue influence from the circumstances of the case, and need not have direct proof. *Callaghan v. Myers* followed.

March
7, 8, 9, 12 &
29.
April 1.

THIS suit, brought by the executrix of the will of John M'Donald against the defendants, one of whom was executor and the other beneficiary under an earlier will, was heard before Sir W. M. Manning, P.J., on March 7, 8, 9, 12, and 29, and on the 1st of April his Honour delivered judgment.

Wise appeared for the plaintiff.

Owen, Q.C. (with him *W. H. Manning*), for the defendants.

In the course of the arguments the following cases were cited:—*Vivers v. Vivers* (1), *Wingrove v. Wingrove* (2), *Handley v. Stacey* (3), *Airey v. Hill* (4), *Kelly v. Thewles* (5), *Constable v. Tufnell* (6), *Greenwood v. Greenwood* (7), *Banks v. Goodfellow* (8), *Montefiore v. Montefiore* (9), *Harwood v. Baker* (10), *Callaghan v. Myers* (11), *Boyse v. Rossborough* (12).

The facts of the case sufficiently appear from his Honour's judgment.

SIR W. M. MANNING, P.J. In this case the plaintiff set up a *Manning, P.J.* will in her favour, made by John M'Donald, late of Greek-street, Glebe, on September 4, 1885; and it was disputed by the defendants, in virtue of an earlier will made by the same person, principally in favour of Mrs. Kerridge, in April, 1879. The plaintiff is a widow, rather advanced in years, and the defendant, Wm. Kerridge, a coachbuilder in Sydney. The cause was heard before me on oral evidence, on the 7th, 8th, 9th, and 21st days of

(1) S.M.H., Dec. 9, 1885.

(2) L.R. 11 P.D. 81.

(3) 1 F. & F. 574.

(4) 2 Add. 206.

(5) Ir. R. 2 Ch. 510.

(6) 4 Hogg. 465.

(7) 3 Curt. Appendix.

(8) L.R. 5 Q.B. 549.

(9) 2 Add. 354.

(10) 3 Moo. P.C. 282.

(11) 1 N.S.W. L.R. 351.

(12) 6 H.L.C. 48.

1887. last month, and also on the 29th, for further evidence on a feature
WATSON in the case on which I desired information before I decided;
v. Mr. *Wise* being the counsel for the plaintiff, and Mr. *Owen*, Q.C.,
KEBRIDGE. and Mr. *W. H. Manning*, for the defendants. I reserved my
Manning, P.J. judgment. Since then I have perused my notes out of Court, and have analysed and weighed the evidence, and have arrived at a conclusion adverse to the will of September, 1885, and practically in favour of that of 1879, although the latter has not yet been brought forward for adjudication, and has only been material in the present inquiry as being the ground of the defendants' status and opposition, and for its bearing, by contrast and otherwise, upon the question whether M'Donald was of sufficiently sound mind when he reversed it by the will of 1885. In disposing of the case, I must begin with the recognition of the *prima facie* validity of the later will, not only in respect of the formalities observed, but the apparent capacity of the maker, so that were it not for evidence unknown to the conveyancer who drew, and to the witnesses who attested the will, there could have been no question of its being a good will in all respects; but upon that evidence I am of opinion that it was not so. To say that I am quite satisfied would, perhaps, be going too far; for although I should not hesitate, if left to my own independent judgment as to the principles by which the Court ought to be guided, and on which, as I have gathered, our brethren in the United States are accustomed to act, yet the disposition of the English Courts is so intensely in favour of supporting freedom of testamentary power and action, even *in extremis*, and under unreasonable caprice—in other words, so conservative of the rights of property to the last and to the full bent of a testator's inclination at the moment of making his will—that I cannot escape some degree of doubt whether I may not be taking a view somewhat transcending the limits of judicial law, as propounded by abler and more elevated Judges on various occasions. I have reviewed the principal English authorities bearing upon the matter in hand, and I have now also examined the later decisions which have been cited in this case; but, although acknowledging their force in favour of the plaintiff's contention, they have failed to convince me that the facts before

me are within their authority. On the contrary, they have left the conviction that the true principles to be gathered from them (each case, be it observed, resting on its own individual facts) are opposed to the validity of this will. Of course, I am here to judge of facts as well as of law, and it rests with me to decide on the credit of the witnesses, and to weigh the evidence as a jury would do; and now, before going into the history of the case as proved, I may begin by saying that I saw no independent reason to doubt the honesty of any of the witnesses, or to discard any of it as otherwise unreliable except that of one witness for the defence (whom it is not necessary to name), who—consistently it may be with honesty—deposed that on or about the 1st of September, 1885, that is to say about three days before the date of the will, the testator was so feeble from old age and dissipation that he could not have mounted a flight of stairs, whereas it is beyond dispute that he did on the 4th September mount and descend a considerable flight, without assistance, at the office of Messrs. Allen & Allen, where the will was made, and then also walked for some distance in the street without apparent difficulty. This witness was undoubtedly wrong in his opinion; but it was a matter of opinion only, and as the deceased may have varied from day to day, I cannot even pronounce this witness dishonest. Nevertheless, I discard his evidence wholly on the ground of this defect. I may next observe that the grounds of opposition to the will were based on what I may designate a fusion of the two issues of mental incapacity in *McDonald*, and undue influence on the part of the plaintiff; that is to say (as held by myself, and by the Full Court on appeal in the case of *Callaghan v. Myers*, some years since) that the degree of mental incapacity and of undue influence are relative, and cannot, therefore, be taken separately. Upon this principle evidence was offered to show that the testator was of great age, and that his mind had become so feeble, by intemperance added to age, that a slight pressure might have influenced him unduly, and that he was—or rather that he must have been (for no direct evidence of influence was obtained)—unduly led to make Mrs. Watson, the plaintiff, his sole heir by the will in question. I entirely adopt this view in this case, as in *Callaghan*

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1887. *v. Myers*; and I reject the argument which was submitted, that
WATSON it was not competent to me, or to a jury, to infer undue influence
v. KERRIDGE. from circumstances, as well as to accept it on direct proof. Such
Manning, P.J. direct proof would rarely be within an opponent's reach; and
there is no more reason for excluding inferences drawn from
such circumstantial evidence on a question of this sort than in
charges of murder, arson, and the like, in which secrecy is a
common element and direct proof not often obtainable. Per-
haps, if the time of the Court and the value of the property per-
mitted, I might even now desire that the questions of fact should
be again considered with the aid of a jury; but they do not so
permit, and I must therefore take the responsibility solely on
myself of deciding them, and under the usual obligation of
Judges deciding such questions I am denied the simplicity of the
answers given by juries on questions submitted to them, and am
expected, accordingly, to state the grounds of decision with
more or less of detail in this case. I shall not go very fully into
the evidence, as is frequently done in the Probate Courts, if only
because I have not time for so much labour; but I will sum-
marise the salient facts and conclusions of fact as I deem them
to be established by the evidence. The testator, John M'Donald,
was at the date of his will over 80 years of age—some said as
much as 83—and he had been during the greater part of his long
life a man of intemperate habits. In the earlier times he was
given to what is called a "spree," lasting for longer or shorter
periods, with longer or shorter intervals of sobriety; but latterly
he was more constantly (though still with intervals) addicted to
excessive indulgence. He was a carpenter by trade, but had
retired from work for 30 years or more, with the exception of
taking an occasional job, the fruits of which he spent on his
favourite indulgence. Up to 1842, or thereabouts, he was
unmarried, but he then married the mother of Mrs. Kerridge,
who was then a widow, with Mrs. Kerridge, then 3 years of age,
as her only child. There were no children by this marriage, but
Mrs. Kerridge was brought up by M'Donald in all respects as if
she were his own daughter. On her marriage, under age, with
the defendant, William Kerridge, in 1856, he gave his consent
as her father or guardian, and was present at and "gave her

away" at her wedding ; and subsequently, as numerous children were born to her and grew up, they were allowed to call him grandfather, and he seems to have treated them as if such were their relation to him. Before this M'Donald had acquired a block of land in Greek-street, Glebe, near Sydney, and had built on it five cottages, in one of which he resided with his wife and her daughter until her marriage, and the others of which he let at a combined rental of 2*l.* 10*s.* a week. It was alleged, but not sufficiently proved, that the houses were erected with the help of means which came from Mrs. M'Donald, and that she and her daughter had helped him to accumulate the money required for the purpose. Being, when sober, a man of penurious habits, he also from time to time got money together from his rents or otherwise, though on occasions of insobriety he was very lavish of it. About five years after Mrs. Kerridge's marriage he made her a present of 100*l.*, and he was accustomed to give Christmas presents to her children. At the date which I have next to mention, being that of his first will, he had a little money in the Savings Bank of New South Wales, in an account opened by him in the head office in Barrack-street in 1877 ; but it is not known what other property beyond the cottages he then had. The account just mentioned was, I may add, kept open by him until a few days after the will of September 4, 1885. Early in 1879 M'Donald went to Messrs. Allen & Allen to have his will made, and gave his instructions to the late Mr. Arthur Allen ; and for some reason or other the will was prepared by counsel, and must therefore have been some considerable time in hand. Before going to execute it he invited Mr. Kerridge to be an executor, and next asked a Mr. Spring, a very respectable person, who was a witness before me, also to be an executor. Mr. Spring demurred, but finally consented, after having been told by M'Donald that he was giving his property to Mrs. Kerridge, "Maggie," as he called her, "as she had the best right to it," and that Mr. Kerridge was to be a co-executor. After having executed this will, he said to some one who asked him where he had been that day, that he had been doing what he had long wished to do—making his will. Subsequently M'Donald told various persons that he had given his property to his wife and

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"Maggie," or to "Maggie," and that they, or she, had the best right to it. This will was a very fully drawn will, disposing of his real and personal estate for the benefit of Mrs. Kerridge, "my stepdaughter," for her life, with remainder to her husband, if surviving, and then to her children, and, failing children, then to such uses as she might appoint; and Mr. Kerridge and Mr. Spring were appointed executors and trustees. No provision was made for Mrs. M'Donald, but it appears that he expected her to pre-decease him. He appears to have considered, up to the time of making the will of 1885, that it operated as an irrevocable deed of gift; but before going to Messrs. Allen & Allen, at that time, he seems to have obtained some new light upon the subject, for he went then to get a new will made, and inquired whether he could make a new will without having the other; and, on being answered by Mr. Bean in the affirmative, he at once gave his instructions for the will in Mrs. Watson's favour. After 1879 M'Donald's indulgence in drink increased, and, as his age also grew greater, his mind became more feeble. There was even much evidence of a reliable character to show that he was at times a complete nuisance to his neighbourhood by his drunken habits and bad language, and that he was, at times, a terror to it by his violence, and by threatening mischief with a knife; whilst at others he was the laughing-stock and butt of children in the streets. Somewhere about 1883 he arranged with Mr. and Mrs. Kerridge to take charge of his wife, Mrs. Kerridge's mother, who was then very infirm, and was much neglected in his own house; and from that time to the present day she has remained there bedridden, and is now beyond the ability to give evidence. Up to his death M'Donald sent 10s. a week as a contribution to her maintenance, latterly by the hands of the plaintiff, Mrs. Watson, who was then more or less in attendance on him. In August, 1884, M'Donald left his own house, where some of his tenants or neighbours appear to have attended somewhat to him, and went to reside at Mr. Kerridge's, where he remained for three months. When he went there he was thought to be under the influence of past intoxication; but during his stay he got no drink in the house, and he was steady until the last fortnight, when he appears

to have got drink outside. After this he left, and went (whether at once or not did not appear) to reside with his tenants, Mr. and Mrs. Murphy, and was there seriously ill. Whilst there he said he had a "dose," or had been "drugged," at Mrs. Kerridge's, and threw out hints that she wanted to kill him and get his property, for which she was waiting; and it reached Mrs. Kerridge's ears that he had accused her of wanting to kill him. In consequence of this she asked him what he had been saying about her, and as he would give her no answer she was greatly hurt, and also, as she said, thought it the best policy not to go near a man who said she wanted to kill him; and for those reasons did not again visit him. For a time she had sent him food cooked by herself, but he would not eat it, in consequence, apparently, of suspicions that it might be drugged, though he passed it on to Mrs. Murphy's children. This was about 18 months before his death. Although Mrs. Kerridge never afterwards went to see him, she sent her children or some of them once a week or fortnight with inquiries for him and with information as to Mrs. M'Donald. This idea of his having had a "dose" at Mrs. Kerridge's was mentioned to several persons, and amongst others to Dr. Mackellar, who visited him for illness whilst at Mrs. Murphy's, and who satisfied himself that there was no foundation for any suspicion of poison, and told him he was a wicked old man, and to get that thought out of his head. The idea appears, however, from the evidence of Mrs. Watson (saving great uncertainty on her part as to her dates) to have been expressed within six months of his death. M'Donald died in September, 1886. During his stay at Mrs. Murphy's he one day offered to make a will in her favour; but Mr. Murphy, who did not consider him in a fit state, would have nothing to do with it, and the idea dropped. This also was about 18 months before his death. After a while he moved out of Mrs. Murphy's house into an old carpenter's shed at the back, and whilst there he again gave way to drink. Some time after this he went to live by himself in one of his cottages, and whilst there some of the neighbours looked after him—to what extent did not appear; and there also Mrs. Watson, who had known him for many years, and whose deceased husband had been an intimate friend

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1887. of his, both in work and in his "sprees," as far back as 40
WATSON years before, came to visit him, as she had also done at Mrs.
v. KERRIDGE. Murphy's, from her own residence a mile away; and after a
Manning, P.J. while she, at his request, engaged a young girl to attend him by
day, and she occasionally visited him in the evening, but did not
live at the house until within a few weeks of his death. This
engagement of the girl was in or about October, 1885, certainly
not so early as the date of the will of 4th September of that year,
at which time the girl said she was at school; and I could not
gather that at the last-named date Mrs. Watson was in any
special way in attendance upon him. On the contrary, a neigh-
bour appears to have done so, and Mrs. Watson only spoke of
seeing him about rent there once a week or once a fortnight or
so. In fact, there is absolutely no evidence to show her to have
been specially in communication with him at that time, and she
herself denies it. If this be so, the will of that date in her
favour is so much the more incomprehensible. On that 4th
September M'Donald went by himself to Messrs. Allen and
Allen, and walked upstairs into the office of Mr. Bean, a convey-
ancer in their employment; and there, after having asked
if he could make a new will, having made a former one and not
having it, he gave Mr. Bean the instructions for a will wholly in
Mrs. Watson's favour, saying "that he intended to give his
property to some one who deserved it, who had been very kind
to him, to some one who deserved it, and not to those who did
not." He had not the former will, which he had, in fact, left
with Mrs. Kerridge, and he did not mention to Mr. Bean who
were the persons in whose favour it had been made, nor did he
mention Mrs. Kerridge's name. The will was prepared at his
request at once, and an appointment first made for the next day,
but by his express wish it was arranged for him to come to
execute it somewhat later on the same day. He attended
accordingly, and the will was read over to him, approved,
acknowledged, signed, and attested by Mr. Bean and another
gentleman in Messrs. Allen and Allen's office. It is of the
simplest character, giving Mrs. Watson everything, and making
her sole executrix, and therefore requiring no grasp of intelli-
gence or of memory. As far as appeared by the evidence, he

does not appear to have mentioned the fact of his having made this new will to any one except to Mrs. Watson and the little girl who attended on him, and certainly no word of it reached Mrs. Kerridge or any of her family, or his neighbours. Mrs. Watson says he told her of it about the time of Christmas, 1885, and the little girl said he had told her a little earlier that Mrs. Watson was to have his property, but that she was not to speak of it. I have spoken of the account which M'Donald had in the Savings Bank in Barrack-street, commencing in 1877. In July, 1885, there was to his credit there the sum of 100*l*. This amount, with a small addition for interest, was drawn out by M'Donald on September 11, for what reason did not in the least appear; but I am satisfied that it came to Mrs. Watson's hands, for it was shown that she had 100*l*. in notes from him, and that she deposited that in the southern branch of the same bank in November following. The 100*l*. was, as Mrs. Watson stated, given to her by M'Donald a few weeks, and she could not swear that it might not have been a month or two months before that deposit by her. M'Donald's deposit was, it will be observed, drawn out just a week after the date of the will in Mrs. Watson's favour, and I have little doubt that the 100*l*. given into Mrs. Watson's hands was the same money, and that she probably received it at the time, or soon after. It is stated by Mrs. Watson that the 100*l*. she had received from M'Donald was the same that she placed in the George-street branch of the bank, that this deposit was made by M'Donald's authority, in the name of M'Donald and herself, jointly and severally, after, as she says, she had it at least a few weeks in her house. In April following she drew it out separately, but with the authority, as she alleges, of M'Donald to do so, and to give it to her son towards completing a new house he was then building. Later on she received a further sum of 80*l*. from M'Donald for the same purpose, as she alleges. And then the day before his death he pointed out to her where she would find 20*l*. "to bury him." Beyond this only 2*l*. odd was found at his death. There was some evidence of his having had at one time within 18 months of his death a building society's deposit receipt for 200*l*. or 250*l*., but what became of it did not appear. The witnesses

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1887. for the defence, that is to say for Mr. and Mrs. Kerridge, as to
WATSON M'Donald's habits prior to the date of this new will were
v. numerous, and the evidence of some of them extended down to
KERRIDGE. a later time, though I gather from the evidence as a whole, that
Manning, P.J. he had been more steady and quiet in the latter part of his life.
For the plaintiff the only evidence, at the opening, was that of
Mr. Bean, who drew this will, and Mr. M'Carthy, who joined in
the attestation ; and in reply to defendant's evidence, no witness
was called by the plaintiff to speak as to M'Donald's life prior to
September, 1885, beyond a somewhat indefinite statement by
Mrs. Watson herself, extending back to 18 months before his
death, or six months prior to the will. Mrs. Watson, the little
girl, and a medical gentleman who attended M'Donald for illness
five months before his death, and subsequently, and a third
clerk of Messrs. Allen and Allen, who saw M'Donald when
leaving Mr. Bean's office with the new will, were the only
witnesses for the plaintiff in reply. Mrs. Watson deposed to
M'Donald's mental capacity prior to the date of the will, and to
the last. The medical man saw no signs to the contrary, and the
three gentlemen at Allen and Allen's all thought him both sober
and sufficiently intelligent on the 4th September, and even, as
they thought, remarkably so for a man of his great age. I have
not, however, been led by my experience to attach very much
weight to evidence of the draftsmen and attesting witnesses of
wills—especially when the wills are very simple—as they gene-
rally see no more than the clearness, it may be, of the client's
purpose in the instructions given, and know nothing of his
general capacity or of the means by which the testator's mind
had been brought to the intention communicated to them ; whilst
a medical man attending a sinking man, and a stranger of over
80, for some special ailment, would have but scant opportunity
for forming a judgment as to his then mental capacity for any-
thing beyond the mention of symptoms. The most remarkable
feature in the plaintiff's evidence is the entire absence of any
rational explanation of M'Donald's action in her favour. She gave
or suggested as a reason for it some extraordinary story of her
husband having helped M'Donald 40 years ago in the defence of
an action for timber supplied to him, by bringing samples of

the timber into Court; but this is little, if true, to set against the claims of Mrs. Kerridge and Mrs. M'Donald, and a fixed and long-standing purpose to deal with her as with a daughter in the bestowal of his property, and it does not coincide with the grounds stated by M'Donald to Mr. Bean, when giving his instructions for the revocation of the old will and the substitution of the new one. Indeed, this story about M'Donald's gratitude is somewhat ludicrous as a cause for this will, except on the supposition that he had become so senile that the remembrance of a benefit in early life had taken the place of and banished the obligations and affections, and the intentions which had arisen and had been continuous during the intervening 40 years—an assumption which would of itself be fatal to the will. The most plausible argument was that the old man may have been incensed at Mrs. Kerridge's having ceased to visit him for some months prior to this will, and that he retained his anger to the last, because she still continued to neglect him; but, on the other hand, he must either have known that she had good cause, or else his delusion was complete. And the fact itself of his entertaining a groundless and irrational suspicion of her having attempted to poison him in order to precipitate her acquisition of his property goes far more to show that his mind was gone, and that the delusion and not Mrs. Kerridge's neglect was the cause of his change of will. In fact, I can find no other clue to his motives. If the fact had been true, or if the belief existed, there was quite enough to occasion that change; but I have not the slightest doubt that it was a pure delusion on the old man's part, and the direct result of a weakening of his intellect by age and intemperance. But after all, this would only account for cancelling the will in Mrs. Kerridge's favour; though not for leaving his bedridden wife without provision, and being cruel to the young people who had been led to look to him as a grandfather; and although such a belief would have sufficed even to account for all this excess in the case of an ill-regulated mind (though of that bare capacity which is too readily recognised as sufficient for testamentary purposes), yet it does not account for the substitution of Mrs. Watson for Mrs. Kerridge and her children. How came that about? Mrs. Kerridge's supposed wickedness was

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1887. no reason for selecting Mrs. Watson, and for contrasting her
WATSON as a person who "deserved it of him," with Mrs. Kerridge
v. "who did not." And in what way had she, up to September
KERRIDGE. 4, 1885, been so kind to him as to earn this reward?
Manning, P.J. This was before she was specially in attendance on him, and
before she had found the young girl to attend him by day,
and it was at a time when, as she tells the Court, she only visited
him once a week or a fortnight. All this is a mystery, and under
a mystery there lies the suspicion that there must be more than
has been made to appear, and that the true cause of Mrs.
Watson's selection has been kept out of view by the person who
probably knows it—that is to say, herself. This sudden and
unexplained change from what approached a lifelong intention,
this casting off of a long-established tie of adoption and affection,
this contrast between the entire openness and deliberateness of
his first will, and its open announcement, with the secrecy
attending the making of the new will, and following it—all this
combines with the other circumstances that have been noticed
to show that there must have been some undue advantage taken
of the old man's weakness and delusion to bring about this (to
them) great bestowal, or else that he was fatuous. I therefore
pronounce against the will. I wish to add that this judgment,
though well considered, has been very hastily put together out
of Court hours, in order that it might be delivered before my
leaving on circuit to-day. The time to appeal against this order
is to date from the date of its appearance in the newspapers.

Solicitors for plaintiff : *Allen & Allen.*

Solicitor for defendants : *T. J. Dickson.*

REID AND ANOTHER v. KEARNEY AND OTHERS.

P. J.

Gift—Deed or will—Declaration of trust—Execution and attestation—Retention of possession—Unnatural gift—Registration Act (7 Vic. No. 16)—Promise of grant—Titles to Land Act (22 Vic. No. 1)—Laches.

1887..

June

14, 15 & 16.

Under a document, purporting to have been executed in 1825, the plaintiffs claimed certain lands in the city of Sydney. The document, which was unregistered, was as follows :—

Sydney,

28th of December, 1825.

This is to certify that I, Henry Linden, of the city of Sydney and colony of New South Wales, have given and granted, and by my own free will have freely given and granted to my beloved child, Annie Clarke, the daughter of Matthew Clarke, all and singular my goods and chattels, consisting of household furniture, horse, cart, and harness, and all the lands I now possess in the city of Sydney and the colony of New South Wales, providing the said Annie Clarke survives I (*sic*), Henry Linden, and my beloved wife, Ann Linden. I freely give the abovementioned goods, chattels, and lands to her absolutely as hers for ever, without any other manner of condition.

In witness whereof I hereunto put my mark and seal this twenty-eighth day of December, one thousand eight hundred and twenty-five.

his
(Signed) Henry × Linden (L.S.)
mark.

Signed, sealed and given over to Matthew Clarke in the presence of us witnesses.

(Signed) John Stubbs.

her
(Signed) Jane × Clarke.
mark.

Held, that the document must be construed as a testamentary document.

Held also, that under the circumstances set out below a registered conveyance for value by a devisee, of lands devised to him by the testator, is entitled to priority as against an unregistered conveyance of the same lands by the testator himself.

Held also, that at the time of executing the document H. L. had not under all the circumstances of the case any transmissible interest in the lands in question.

Held also, that as the document did not pass any estate or interest at law in the lands, the Court would not decree a conveyance of the legal estate thereunder to a volunteer.

The Court looks with suspicion on a document, produced after the death of the person making it, and of both witnesses, which purports to make an unnatural gift of property, where it is executed by a marksman, one of the attesting witnesses being also a marksman, and the document being in the handwriting of the other attesting witness, even where such a document, by statute, proves itself.

THE plaintiffs in this suit were Annie Reid, mentioned as Annie Clarke in the document set out above, and her husband. The defendants were the trustees under the will of Henry Linden, and Frank McDonald, who had, at different times
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previous to the commencement of this suit, purchased from the devisees under the will of Henry Linden their respective interests in the lands devised by him, and who was now in the possession of the lands claimed by the plaintiffs. The suit as against the trustees was by consent dismissed with costs. The facts of the case were, shortly, as follows :—

In December, 1825, Henry Linden executed the document on which the plaintiffs based their claim. Evidence was given to show that at that time he was in possession of certain lands situate in Kent-street, Sussex-street, Market-street, and Castle-reagh-street. It also appeared that at the date in question he was married, and there was issue of the marriage. To prove that in 1825 Henry Linden had a transmissible interest in the lands in question, the plaintiffs put in a proclamation in the *Gazette* of 8th of June, 1829, the material part of which was as follows :—

“Whereas much inconvenience hath been occasioned by the want of sufficient titles for allotments of land in the town of Sydney, and whereas such titles have not been issued by the Government except in a few instances since the thirtieth day of June, 1823. Now, therefore, in order to remedy this inconvenience and give the necessary security to private property, I, the Governor, by virtue of the authority in me vested, do hereby ordain and proclaim that, on application being made, a grant in fee simple shall be issued under the conditions hereinafter specified to every person (or his lawful representative) who, on or before the said thirtieth day of June, 1823, was *bona fide* in possession by lease from the Government (whether such lease be expired or not), or by mere right of occupancy of any allotment of land in the said town of Sydney not hitherto alienated by the Crown, and not specified in a certain order of the Government bearing even date herewith, number thirty, or otherwise notified heretofore as being required for public purposes. Reserving, however, and keeping harmless all rights of other private individuals which may be lawfully established at any time hereafter ; and in order that all parties interested may have an opportunity of proving such their respective rights, a description of each allotment, with notice of the intention to complete a grant thereof, shall be published three months previously for general information.”

Notifications in the N.S.W. *Government Gazettes* of the 10th of June, 1834, and of the 2nd of December, 1834, and the Crown grants of the lands claimed were put in. The form of the notifications was as follows :—

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“The following descriptions of allotments of land in the town of Sydney, with the names of the parties by whom they are respectively claimed, are published for general information, and notice is hereby given that at the end of three months from the present date, unless written caveats be previously lodged in this office, deeds of grant will be prepared in conformity with the proclamation dated 8th of June, 1829, in favour of those claimants who are free for such allotments as are not reserved or already granted.”

The land claimed in this suit was described as being claimed by Henry Linden, and the quit-rent was to commence from the 1st of July, 1823.

By a settlement made in September, 1852, in contemplation of the marriage of his son, Henry Linden conveyed the Castle-reagh and Market streets properties to trustees on trusts therein mentioned. This settlement having been made for valuable consideration, the plaintiffs abandoned their claim so far as it related to the properties comprised therein.

In 1861 Henry Linden made his will, by which his residuary real estate, which comprised the properties now claimed, was devised to trustees, in trust for his wife, Ann Linden, for life, remainder to his children equally, and in 1860 he died, having remained in possession of the lands, the subject of this suit, up to the time of his death. In the year 1869 Ann Linden died. After the death of John Henry Linden, the son of Henry Linden, which took place in the year 1874, these properties were the subject of considerable litigation, and eventually the whole of the residuary real estate of Henry Linden became vested in the defendant, Frank McDonald, the legal estate being conveyed to him by the trustees on the 5th of February, 1885. This suit was not begun till August, 1886, though plaintiff stated that counsel's opinion had been taken in 1879. The document set up had not been registered, probably owing to s. 18 of the Registration of Deeds Act (7 Vic. No. 16) not having been complied with.

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On the facts as set out above, the plaintiffs submitted that they were entitled under the document of 1825 to an equitable estate in fee simple in the Sussex-street and Kent-street properties, and prayed that the defendant might be ordered to convey the legal estate to them, and to account for rents and profits received while he was in possession.

For the defence the points taken were:—

1. That in December, 1825, Henry Linden had no transmissible interest in the land in question.

2. That the document set up had not been registered, and was wholly voluntary, and consequently void as against subsequent purchasers for value from Henry Linden.

3. That under the document the plaintiffs took at most only a life estate.

4. That the document was intended by Henry Linden, and understood by the plaintiffs, to operate as a testamentary disposition, and that it was not executed in conformity with the *Statute of Frauds*.

5. That, even if so executed, it was revoked by Henry Linden's subsequent will made in 1861.

6. That by the issue of the Crown grants to Henry Linden any interest the plaintiff might have had in the lands in question was extinguished.

7. That the document set up did not pass any estate or interest at law, and that consequently the Court would not decree a conveyance of the legal estate thereunder to a volunteer.

8. That the defendant was a purchaser for value, without notice of the plaintiffs' claim, from the devisees of, and purchasers from, Henry Linden, of the lands in question, and that the several conveyances to him had been duly registered.

9. That the plaintiffs had been guilty of laches in such a degree as to disentitle them to relief in a Court of Equity.

Wise, A.-G., for the plaintiffs. The laches alleged in this suit is not such as to disentitle the plaintiffs to the relief sought for. Their right accrued in 1869, that is to say after the deaths of Henry and Ann Linden; their acquiescence for the 10 years from 1869-1879 was due to their misconception of the effect of the specific devises in the will of Henry Linden on the document in their possession. From 1879 to the present time their

inaction has been caused by the neglect of their legal advisers to take proper steps, and by their poverty. Unless there is something in the conduct of the applicant to disentitle him to relief, Equity will follow the law, and will not bar a plaintiff's right except after the lapse of 20 years.

On this point he cites *Earl of Beauchamp v. Wynne* (1), with reference specially to passages in the judgment of *Chelmsford*, L.C., at pp. 230, 232.

That Henry Linden was promisee of a grant of these lands before 1825, is proved by the proclamation in the *Gazette* of June, 1829, on which the grant issued in 1837 is based. The notifications in the *Gazettes* of the 10th of June and of the 2nd of December, 1834, connect the grant with the proclamation. The grant would not have issued to a person having no right to demand it.

On this point he refers to ss. 1 and 14 of 22 Vic. No. 1. (*Titles to Land Act*).

Walker followed on the same side, and in support of the contention that H. L. had in December, 1825, a transmissible interest in the lands in question, and that defendant was estopped from denying that fact, cited *Bucknell v. Mann* (2).

Owen, Q.C., for the defendants, argued that the document set up by the plaintiffs was not a deed but a testamentary document, and that as it had not been duly executed as a will, it was entirely inoperative. Even if it had been so executed, it was revoked by the will subsequently made by H. L. In support of this contention he cited the following cases:—*Habergham v. Vincent* (3), *Ward v. Turner* (4), *Ouseley v. Carroll* (5), *Thorold v. Thorold* (6), *In the Goods of Morgan* (7).

That this document could not operate as a declaration of trust is shown by the cases:—*Warriner v. Rogers* (8) and *Richards v. Delbridge* (9).

The document is therefore not a deed, because it is not to

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(1) L.R. 6 H.L. 223.

(2) 2 S.C.R. 1.

(3) 2 Ves. 204.

(4) 2 Ves. sen. 440.

(5) 2 Ves. sen. 440 (in notes).

(6) 1 Phil. 1.

(7) L.R. 1 P. & D. 214.

(8) L.R. 16 Eq. 340.

(9) L.R. 18 Eq. 11.

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take effect till after the death of the alleged grantor ; it is not a will because it is not duly executed, and was revoked ; and it cannot operate as a declaration of trust.

As to the question whether Henry Linden had any transmissible interest, the plaintiffs have not proved, as it is incumbent on them to do, that he had in or before the year 1825 any promise of a grant: *Hillas v. Magoveran* (10), and *Cockcroft v. Hancy*, cited in that case (11).

That the doctrine of estoppel does not apply here is shown by *Johnston v. Riley* (12), and *The General Finance, &c., Co. v. The Liberator, &c., Society* (13).

The plaintiff, who is a volunteer, asks the Court to perfect an imperfect deed for her. The Court will not do that: *Warriner v. Rogers* (8), *Richards v. Delbridge* (9).

On the question of laches, he refers to *Story's Equity Jurisprudence*, §. 529.

[*Manning*, P.J., refers to Lord *Camden's* remarks in *Smith v. Clay* (14), commented on in *Story's Equity Jurisprudence*, §§. 64A and 529.]

G. Knox. The document set up here cannot be a deed because it purports to pass a future freehold interest without a freehold interest in possession to support it. It can only operate as a will or as a covenant. If treated as a will, it fails for want of proper execution, and if as a covenant, it fails because the Court will not enforce a covenant in favour of a volunteer. It is evident that the document must have been intended to operate as a will, because it could never have been contemplated that Linden should give up the control of all his property, real and personal. That the plaintiff understood the document in that way is proved by her abstaining from making any attempt to enforce her right till after Linden's death. A registered conveyance by a devisee will take priority of an unregistered conveyance by the testator. The practice of conveyancers in this colony has always been to treat wills as not requiring registration, though

(10) 2 S.C.R. Eq. 62.

(13) L.R. 10 Ch. D. 15.

(11) 9 S.C.R. App.

(14) 3 Bro. Ch. 639, Ambl. 647.

(12) 2 S.C.R. N.S. Eq. 1.

the English decisions are the other way. On this point s. 11 of the *Registration of Deeds Act* (7 Vic. No. 16) is conclusive.

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Wise, A.-G., in reply. On the question whether this document is a will or a deed, the remarks of *Kindersley, V.C.*, in *Patch v. Shore* (15) are strongly in our favour. One of the chief characteristics of a deed is that it is delivered by the maker to some other person, whereas a will is kept by the testator. Here the document on the face of it proves that it was delivered to the plaintiff's father.

With regard to the question whether any interest passed under the document, there is a distinction between a deed of gift taking effect at once, and giving present enjoyment and a gift by which the enjoyment is deferred.

[*Manning, P.J.* Here there is no particular estate of freehold created for the future freehold estate to rest on.]

It is created by implication in *Linden* and his wife: *Thompson v. Brown* (16). The transmissibility of *Linden's* interest is shown by the proclamation, which did not create new rights, but only recognised existing ones. The fact of the grant issuing also shows that there must have been a pre-existing right to the lands comprised in the grant.

A registered conveyance by a devisee should not take priority of an unregistered conveyance by the testator.

[*Manning, P.J.* Here the registered conveyance by the devisee is to a purchaser for value, while the unregistered conveyance by the testator is in favour of a volunteer.]

Owen, Q.C., is heard on the two new cases cited.

SIR W. M. MANNING, P.J. In this case I shall not reserve my *Manning, P.J.* decision, as I am quite clear that I ought to decide in favour of the defendants. A considerable number of points have been raised in this case, and, in my opinion, every one of them is fatal to the plaintiffs' claim. As far as the Market-street and Castlereagh-street properties are concerned, the claim has been abandoned, so that now the issue is confined to the Sussex-street and Kent-street properties. The plaintiffs in this suit

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have come to the Court of Equity because they cannot take any steps to assert their title to these lands in a Court of Law without first succeeding in this suit. Now, a Court of Equity always discountenances stale claims, and if it sees reason to doubt that the equity and justice of the case are in the plaintiffs' favour, it will not strain its power to help them, for fear that by doing so it may be the means of doing an injustice to the other party. This is more especially the case where the silence of the plaintiff as to the nature of the claim has put the defendant at a disadvantage in his efforts to resist the claim. With regard to the document itself, the question for me is whether I can so far rely on it as to give effect to it. It is a strange document in many ways, though there is no striking informality in the wording of it. In the first place it is executed by a marksman, and one of the witnesses, the plaintiff's mother, is a markswoman also. The document is in the handwriting of the other witness. Then again we have evidence that Linden at the time of executing this document was the father of one child at least. These circumstances are sufficient to cast some suspicion on the document, even though by statute it proves itself. Now, if it had been presented in the lifetime of Linden, it would have been possible to institute an inquiry as to whether this document was really executed by Linden, and if so, whether it was read over to him before he executed it. As it is, one of the attesting witnesses is so old as to be unable to give evidence, the other attesting witness is dead, and Linden himself is also dead. Under these circumstances the document becomes altogether unsusceptible of investigation. The Court would not be disposed to give effect to a deed of this nature, even though it were of recent date, without the evidence by which it was sought to establish the deed being thoroughly sifted. Ought we not, then, to feel even more reluctant to give effect to a document of that nature when we can get no evidence of its execution except a proof which is recognised only by statute? Then we must consider to what it is due that no inquiry can be made into the circumstances under which the document was executed. I am of opinion that it is due solely to the laches of the plaintiffs in not bringing forward their claim at an earlier date. Even if the document had been

set up in 1869, when the alleged right of the plaintiffs accrued, it might have been possible to find out something about its execution. Then, again, another very suspicious circumstance is that at the time of executing this document, for which there was absolutely no consideration whatever, Linden had a child of his own. Now if Linden had had no child one might possibly have been able to understand his giving all his real property to the child of his old friend, but even in that case it is difficult to imagine that he would have included in the gift all his personalty, even to the horse, cart, and harness, which were necessary to him in his business. Taking into consideration the fact that he had a child of his own, it is not only improbable—it is against nature—that he should have made this gift intentionally and with full knowledge of what he was doing. I think the suspicion generated by these facts alone is of itself sufficient to induce a Court of Equity to decline to assist the plaintiffs. Then there is the question whether there is any sufficient proof that Henry Linden possessed any assignable interest in 1825, under which this document could be supported as a conveyance; and I am of opinion that there is not. His title to a freehold originated in the proclamation of 1829, by which a free gift of the freehold was tendered to persons “who, on or before the 30th of June, 1823, were in *bonâ fide* possession, by lease from the Government (whether such lease were expired or not), or by mere right of occupancy.” Therefore, when he was named by the *Gazette* notice as a person to whom these lands would be granted under the proclamation, it is to be assumed that, in 1823, and down to the date of the proclamation, he was either a lessee of the Crown, under a lease which might have expired, or a person in possession only by “mere right of occupancy;” but nothing more can be assumed, and this could not in law constitute any right at all against the Crown; and certainly could not have then supported a conveyance in fee. And even after the *Gazette* notices Mr. Linden need not have accepted the grants subject to the quit-rent reserved by the notices, and might have allowed the promised gift to lapse. Neither the proclamation nor the announcements in the *Gazette*, nor the grants when issued, could relate back to the date of this document, so as to create a title as of that date;

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nor do I consider that they could enure for the benefit of Miss Clarke by way of estoppel in virtue of this document in her favour. To pass to another point set up as a ground of defence, the question whether this document is to be construed as a will or as a deed. Assuming that it was duly executed and handed over as stated on the face of the document, still I am of opinion that it is a will. Both the inherent terms of the document, and the manner in which it was manifestly intended to operate on the property which it purported to pass, but of which Linden retained possession till the time of his death, appear to me to be conclusively in favour of that opinion. Even if we could gather that this document was intended by the testator to operate as a deed, we should be obliged to regard it as at best an imperfect deed, since it conveys no freehold estate in possession for the future estate of freehold given by it to rest on, and as no estate at law is conveyed by the deed, this is an imperfection which this Court will not remedy. But from the fact of Linden dealing with the property as his own both in the settlement of 1852 and in his subsequent will it is abundantly clear that he regarded this document, assuming its genuineness, as intended to operate only as a will after the deaths of himself and his wife. And it seems to me that the conduct of the plaintiff with respect to the document shows that she too regarded it as only to take effect on the property comprised in it in so far as it might not be annulled or modified by any subsequent disposition of the property by Linden.

As to the question of registration, I think that point also should be decided in favour of the defendant. He is the purchaser for valuable consideration of lands devised by the late Linden, from the devisees, and the conveyances of those lands are registered. I think those conveyances ought unquestionably to have priority over an unregistered conveyance made for no consideration by the testator.

The remaining ground of defence is that of laches, and in my opinion that ground alone is fatal to the claim set up. The document is now 62 years old, and during the lives of Linden and his wife was kept as a pocket deed without being set up by the plaintiff and without recognition by Linden, and the

alleged reversionary right of the plaintiff accrued in 1869, yet on her own showing she took no step till 1879, when she took counsel's opinion; but no notice of her claim was given to any of the parties interested in the property till 1883, though there had been prolonged litigation over the property and numerous dealings with it from the death of John Henry Linden till the institution of this suit.

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On all these grounds I am of opinion that this suit should be dismissed with costs, and I may add that I consider that the plaintiff's success would have been a disgrace to the law.

Suit dismissed with costs.

Solicitors for plaintiffs: *Way & Way.*

Solicitors for defendants: *Want, Johnson & Co.*

Re McCULLOCH'S COSTS.

Practice—Bill of costs—Taxation by Master in Equity—Special agreement—
11 Vic. No. 33, s. 2.

P. J.

1887.

June 10.

On the taxation of a bill of costs the Master has jurisdiction to determine whether or not an agreement as to the scale on which costs were to be charged was made between the parties, and to tax the bill on the basis of such agreement.

The Court will not disturb the finding of the Master on a question of fact, unless satisfied that he was clearly wrong.

THIS was an application for a review of the taxation by the Master in Equity of a bill of costs delivered by A. H. McCulloch, a solicitor of the Court, to P. Harper, on the ground, among others, that the Master had taxed such bill on the basis of a special agreement, alleged by Harper to have been made between himself and McCulloch, but denied by McCulloch. The bill delivered amounted to 65*l.* 13*s.* 2*d.*; but as the taxation, in the manner described, reduced it to 16*l.* 14*s.*, the Master allowed Harper the costs of the taxation, amounting to 15*l.* 1*s.* 2*d.*, thus reducing the amount due from Harper to McCulloch to 1*l.* 12*s.* 10*d.*, for which amount the Master signed a certificate. On this McCulloch brought an action in the District Court against Harper for the recovery of the amount of his original bill (65*l.* 13*s.* 2*d.*), whereupon Harper applied to the Full Court for an order to compel McCulloch to give up certain title deeds which he held as

1887. security for his costs, and also for an injunction staying the action.
Re On the amount found to be due by the Master (1*l.* 12*s.* 10*d.*)
 McCulloch's being tendered by Harper, both these orders were made, and
 Costs. McCulloch was allowed a fortnight within which to apply to the
 Primary Judge for a review of the Master's taxation.

C. J. Manning for the applicant. The Master has no jurisdiction to entertain the question whether there is or is not an agreement between the parties. If the fact that there is an agreement is established, the Master should tax the bill on the basis of that agreement; but if that fact is in dispute the Master has no jurisdiction to go into the facts and determine whether there is or is not an agreement. The case relied on by the Master is *Re Philp* (1), but in that case the agreement was a clear one in writing: the fact that there was an agreement was not disputed. In *In re Eyre* (2), it was decided that where an agreement goes to the whole bill, as in the case here, its validity must be determined before the bill can be referred for taxation. In *In re Beale* (3), the Master of the Rolls decided that, on petition, he had not jurisdiction to determine the construction and effect of a special agreement set up in that case, and that there was nothing to be done until that question was decided. *In re Thompson* (4), and *In re Whitcombe* (5), were also cited in support of the application; and *Seton on Decrees*, p. 610, was referred to.

Owen, Q.C. (Field with him), contra. In all the cases relied on in support of the application, the question to be decided was as to the construction of the agreement. But that question does not arise here. The interpretation of this agreement is perfectly clear. The question here is one of fact—agreement or no agreement—and a question of that kind the Master has jurisdiction to determine, even though he may not have jurisdiction to interpret a contract.

Under the *Attorneys Act* in force in England the Master has not such wide powers as under our Act, since in England the Court decides the facts before the matter is referred to the Master, whereas here the parties go direct to the Master.

(1) 2 Giff. 35.

(4) 8 Beav. 237.

(2) 2 Ph. 367.

(5) 8 Beav. 140.

(3) 11 Beav. 600.

He refers to *Deere v. Robinson* (6). In *In re Hair* (7) it was decided that the taxing Masters had jurisdiction to determine questions of retainer; and the question here is really one of retainer.

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He also refers to *Re Ransom* (8) and *In re Philp* (1).

O. J. Manning, in reply. The question here cannot be regarded as one of retainer, since it is admitted that McCulloch was retained. The question is whether his charges were to be made on one scale or another. *Deere v. Robinson* (6) does not apply, the question there being in effect whether one firm of solicitors were not agents for another firm.

SIR W. M. MANNING, P.J. I am of opinion that this application must be dismissed. In most of the cases cited in the course of the argument, the agreement appears to have been in writing; but there is nothing in any of them to show that any distinction would have been drawn between written and parol agreements. For the purposes of the present discussion, I shall take a parol agreement to have the same effect as a written one, although, on an enquiry as to the fact of agreement or no agreement, I should, in the absence of written proof, incline towards the ordinary rules of taxation. The power of the Master to tax bills of costs in this colony is conferred on him by the *Attorneys Costs Act* (11 Vic. No. 33), and in the words of that Act bills of costs are to be "taxed and settled by such officer." Now, I am clearly of opinion that those words must be taken to mean that, so far as the taxation of a bill of costs is concerned, the Master is to be invested with a judicial authority, and in order that he may exercise that authority in the proper manner, I think the Act must be taken to have empowered him to make all incidental enquiries necessary to enable him to come to a right decision on the matter before him. Such a power is necessary to the proper discharge of his duties; and, in my opinion, includes the power to enquire whether or not there was any agreement entered into between the parties. The case of *In re Philp* (1) is strongly in favour of this view of the question. I consider that there is no

(6) 7 Hare. 233.

(7) 10 Beav. 187.

(8) 18 Beav. 220.

1887. essential difference between the question of retainer, which it is admitted the Master has power to determine, and the question of an agreement such as has arisen in this case. It seems to me that it is very desirable that the Master should have power to take the course he has adopted in this case, since, otherwise, whenever any question arose as to one of these agreements—which are, I dare say, of very common occurrence—the parties would be put to the expense of coming to this Court to have the question decided before the bill could be referred to the Master for taxation.

Application dismissed with costs.

Solicitor for respondent: *Hughes.*

NOTE.—His Honour refused to review the Master's decision, on the ground that it was contrary to the facts disclosed by the affidavits on which the Master decided the question, holding that the Court ought not to disturb the finding of the Master unless satisfied that his decision was clearly wrong.

Feb. 24.

JOHNSTON AND OTHERS v. DICKENSON AND OTHERS.

ON APPEAL.

Dowry grant—"Heirs of such children lawfully issuing"—Estate in fee simple.

*Darley C.J.
Faucett J.
and
Innes J.*

Grant to trustees on trust, &c. Remainder to R. J. and F., his wife. In case there shall be but one child of the said marriage, to the use of such only child, his heirs and assigns for ever; and in case there shall be more than one child, then to the use of all and every the children of the said marriage equally, to be divided between them, share and share alike as tenants in common, and of the heirs of such children lawfully issuing. And for default of such issue of the said marriage, or being such if all shall die in the lifetime of the said R. J. and F., his wife, or of the survivor of them, &c., &c.

Held, reversing the decision of *Manning, P.J.*, that the original children took as tenants in common in fee simple.

THIS was an appeal by three of the defendants against a decree on further consideration made in this suit by *Manning, P.J.*, on the 25th of November, 1886. The decree appealed from is reported in 7 N.S.W. L.R. Eq., p. 63. The following grounds were stated in the notice of appeal:—1. That upon the proper construction of the limitations contained in the deed of grant of the 30th April, 1840, his Honour should have

held that the children of Robert Johnston in the said deed mentioned took estates as tenants in common in fee in the lands and premises therein referred to.

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2. That consequently his Honour should have declared that the share or interest of the late Algernon Johnston, son of the said Robert Johnston, and now deceased, passed under the will of the said Algernon Johnston to the defendants, Leslie Johnston, Percival Johnston, and John Booth Jones, as his executors and trustees named therein, and should have decreed accordingly.

Dawson appeared for the plaintiffs in charge generally.

Lingen for the three appellant defendants mentioned above. The words "lawfully issuing" are mere surplusage, like "lawfully begotten," and therefore cannot avail to cut down the fee simple. Besides, there are no words in the deed which indicate of whose body the issue is to be; and it is laid down (1) that unless it be limited by the gift of what body the issue shall be, he to whom such gift is made hath a fee simple (2).

In *Idle v. Cook* (3) it is laid down that by surrender of a copyhold to the use of baron and feme for their lives *et hæredum et assignatorum* of the said baron and feme, *et pro defectu talis exitus* to the right heirs of the surrenderer, the baron and feme take an estate in fee; and *Powis, J.*, in his judgment in that case, says that the words *de* or *ex* are absolutely necessary to make an estate tail. To make an estate tail, the passage "heirs of such children" must be read "heirs out of or from such children lawfully issuing." In *Abraham v. Twigg* (4), it was decided that a gift to a man and his heirs males *lawfully engendered* was a fee simple, though limited by way of use, the ground of the decision being that the body from which the heirs were to issue was not specified by the gift. *Beresford's Case* (5) is not an authority on the point in question here in favour of an entail, since in that case the decision was based (in the last three lines of the report) on the construction of the whole deed. There the

(1) Co. Lit. s. 31.

(4) 1 Cro. Eliz. 478.

(2) Elphinstone on Deeds, B. 72, p. 230.

(5) 7 Rep. 41a.

(3) 1 P. Wms. 70.

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gift was to George, and the heirs males of his body lawfully begotten, and for default of such issue, to Aden and the heirs males of Aden lawfully begotten, and for default of such issue to the heirs males of the body of James, and the following estates were estates tail in express technical terms. There, before and after the gift to Aden, the estates given were estates tail; those after would fail unless Aden's estate was an entail. The only "issue" could be from (*de*) Aden: judgment of *Willes*, C.J., in *Goodright d. Goodridge v. Goodridge* (6). The gift over in this deed "in default of such issue" is not sufficient to cut down the fee simple. *Olivant v. Wright* (7) and *Idle v. Cook* (3) are authorities for this proposition. *Morgan v. Morgan* (8) is distinguishable on the ground that that case was decided on the construction of the whole deed; and it could be supported under *Rule 74, Elphinst.*, p. 234. In the event of there being only one child of the marriage of Robert and Fanny, he clearly takes a fee simple under the grant, and therefore to construe the deed consistently it is necessary to hold that if there were more than one child of the said marriage, the children, however many in number, took as tenants in common in fee simple.

Simpson, in support of the decree. It is evident that in the event of there being but one child of the marriage of Robert and Fanny, the draftsman knew the proper form of limitation to give that child the fee simple, so we must presume that he was not ignorant of the proper form in the event of there being more children than one. This throws us back on the question of the correct meaning of the words "lawfully issuing." There are three possible constructions of these words. 1. That contended for by the appellants—"the lawfully issuing heirs of such children;" 2. as agreeing with children—"the heirs of such lawfully issuing children;" 3. As governing children and the predicate of heirs—"heirs lawfully issuing of (*de*) such children." It is laid down in *Beresford's Case* (4) that if there are words which in any way show from what body the issue is to spring, they are sufficient to cut down the fee simple, which would otherwise pass by the gift. I contend that if the last of the three constructions given

(6) *Willes* 374.

(7) 9 Ch. D. 646.

(8) L.R. 10 Eq. Cas. 99.

above is taken, the bodies whence the issue is to spring are sufficiently designated. If the words "lawfully issuing" can be construed so as to bear any meaning at all, the Court will not hold that they are mere surplusage. Our contention is that the deed sufficiently clearly points out the bodies from which the issue is to spring.

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We also rely on the gift over, unless the grant is read as if there were a full stop after the limitation to the child of the marriage in case there is only one child. The limitation of the power is subsequent to the grant of a fee simple, and is therefore useless, for if the children take as tenants-in-common in fee simple, the gift of the power is clearly void.

[DARLEY, C.J. The gift over is contingent on no child being born. If no child is born, Mrs. Johnston takes the power.]

If the children take an estate-tail, the gift over, in default of issue, is a perfectly good remainder at any time, unless or until the entail is barred.

[DARLEY, C.J. Must not the words "in default of such issue" be held to mean "in default of children of the said marriage." It is so laid down in *Doe d. Cumberbach v. Perryn* (9.)]

I submit that they do not bear that meaning. "The word 'issue' *prima facie* means descendants:" *Elphinstone on Deeds*, 128, p. 320, and the cases there cited—*Ralph v. Carrick* (10), *Morgan v. Thomas* (11), and *Denis' Trusts* (12). If "issue" is construed as "children," the grandchildren are cut out.

[DARLEY, C.J. Not if so construing it gives the children a fee simple.]

[FAUCETT, J. "Such issue" must refer to issue mentioned before; *i.e.*, children of the said marriage.]

The whole deed must be construed together, and if you take the meaning of the first words as doubtful, it is more in

(9) 3 T.B. 484.

(11) 9 Q.B.D. 646.

(10) 11 Ch. D. 883.

(12) Ir. Rep. 10 Eq. 86.

1887. consonance with the whole of the deed that the children should
 JOHNSTON take an estate-tail than a fee simple. See *Elphinstone*, p. 323,
 v. corollary to v. 128.
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Lingen in reply.

If the first words give a fee simple, no subsequent words, if merely doubtful, can cut that down to an estate-tail. In default of issue means "if no children are born of the said marriage."

[DARLEY, C.J. Suppose this were an estate-tail; if there were four children of the marriage, and three died unmarried during their parents' lifetime, but one survives, what becomes of the estates of the three deceased children?]

They revert to the Crown. That would be a singular form of an endowment to encourage settlement and population. If only one child is born he takes a fee, but if three are born and two die in infancy, or before barring their entail, their shares would go to the Crown, and the survivor would take only one-third. "In default of such issue" cannot mean a general failure of issue, and therefore the subsequent words are idle. The separate shares have not been dealt with at all beyond being given to the children. The words "in default of such issue" apply to the whole property, not to the separate shares of it. Another interpretation of "such issue" is that it is an abbreviation of "such children lawfully issuing;" and therefore "issue" is limited to children of the marriage, which is more consistent with the attempt to give the parents a power of appointment, if the issue died in the life of the survivor.

The following authorities were also referred to in the course of the argument:—*Doe d. Littledale v. Smeddle* (13), *Foster v. Hayes* (14), *Jarman on Wills*, vol. II., 455, 4th ed.; *Morgan v. Morgan* (15).

Cur. adv. vult.

July 25. On the 25th of July, 1887, the judgment of the Court was delivered by

Judgment FAUCETT, J. This is an appeal from a decision of the Primary Judge; and the only question is, whether his Honour was right
 (13) 2 B. & Ald. 126. (14) 2 E. & B. 27. (15) 10 Eq. 99.

in holding that under the limitations of a grant from the Crown of certain lands mentioned in the pleadings the children of Robert Johnston and Fanny Johnston, his wife, for whose benefit the grant was issued, took estates as tenants in common, *in tail*. The grant is to trustees, and the limitations are as follows:—To hold to the trustees and their heirs to the use of Robert Johnston for his life, and on his death to the use of Fanny Johnston for her life, and after the decease of the survivor of them, the said Robert Johnston and the said Fanny, his wife, in case there should be but one child of the said marriage, to the use of such only child, his or her heirs and assigns for ever; and in case there should be more than one child, then to the use of all and every the children of the marriage of the said Robert Johnston and Fanny, his wife, equally, to be divided between them share and share alike as tenants in common, and of the heirs of such children lawfully issuing, and for default of such issue of the said marriage, then to the uses in the said deed of grant mentioned.

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This case must, we think, be governed by the case of *Abraham v. Twigg* (4), *Dormer's Case* (cited in *Beresford's Case*) (16), and by the case of *Idle v. Cook* (8).

In the former case, the words of the limitation were "to the use of Gabriel Dormer and his heirs male lawfully begotten, *et pro defectu talis exitus*, then to the use, &c., &c.; and it was adjudged that Gabriel Dormer had a fee simple.

In the other case—*Idle v. Cook*—the question arose in reference to a surrender of copyhold lands to certain uses, the construction of which, it was held, must be the same as if the estate had been limited by feoffment or any other deed, and must be governed by the same rules of the common law. In that case Zachariah Cliff being seised in fee of copyhold lands, surrendered them to the use of himself for life, and after his decease to the use of Valentine Cliff, his eldest son, and Alice, his wife, *pro et durante termino vitarum suarum et hæredum et assignatorum predictorum Valentini et Aliciæ et pro defectu talis exitus*, to the use of the right heirs of Zachariah for ever. Gould, J., thought that this was an estate-tail, but the other Judges—Powis, J.,

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Powell, J., and Holt, C.J.—although thinking that the surrenderer intended to give Valentine and Alice only an estate-tail, held it to be an estate in fee in Valentine and Alice.

The reason given for the decision is, that it is a constant rule of law that it is necessary, upon the creation of every estate-tail, that it be expressed in certain of what bodies the heirs inheritable should issue, and this is of the essence of the estate (17). The words of the limitation give a fee simple to Valentine and Alice; and that fee simple is not cut down to an estate-tail by the subsequent words, *pro defectu talis exitus*, as they do not show from what body the issue is to come; “for the words (such issue)” says *Holt, C.J.*, “import heirs general, for there is no heir but is the issue of some body; so that it is only the limitation of one fee simple for another.”

No doubt it is not necessary, in order to create an estate-tail, that any precise words, such as *de corpore*, should be used to indicate the body from which the heirs should come. Equivalent words are sufficient, and in *Beresford's Case* (5) some cases are mentioned in which equivalent words were used. In one the words *de R. et K. exsuntis*, and *hæredes de se*, were considered as sufficiently pointing out the body from which the heirs were to spring. “All this,” in the language of the report, “is by force of this preposition (*de*) and issuing.”

In another case the words “*quos sibi contingerit habere de uxore sua*” are held sufficient. In another case the words “*hæredibus suis de primâ uxore*” are held sufficient.

In *Beresford's Case* (5) it is evident that in the construction of the limitations all parts of the deed are read together; and, in order to give effect to the whole, Aden's estate was held to be an estate tail.

So also in *Morgan v. Morgan* (15), the Master of the Rolls would seem to have wished to give effect to all parts of the settlement. Besides, his Lordship probably considered that the words “if he died without issue,” as applied to each of the sons, sufficiently pointed out the body from which, in each case, the heirs were to come.

In the present case there are no such expressions to indicate

the bodies from which the heirs are to come. And when we consider the limitations we find that there are two events mentioned. The first is, that there should be only one child of the marriage of Robert Johnston and Fanny, his wife. The second is, that there should be more than one child. In the first case, after the death of the survivor of Robert Johnston and Fanny Johnston, an estate in fee simple is clearly given to the only child. In the other event, an estate is, with equal clearness, given to all and every the children as tenants in common in fee simple. The words "lawfully issuing" are not sufficient to cut down that fee simple to any estate tail, as they do not point out the body from which the heirs are to come. They must be treated as surplusage, and as having no effect, as all the heirs must be "lawfully issuing." How it might be in the case of a will, it is not necessary to say. In this way the limitations are uniform—in the one case an estate in fee simple is given to the only child, in the other case an estate in fee simple is likewise given to all the children as tenants in common.

There is a third event, namely, that there should be no children of the marriage; in which case the limitations are to other uses. But with this we have nothing to do. We are of opinion, therefore, that the children of Robert Johnston and Fanny, his wife, take, under the grant, estates as tenants in common in fee simple.

The order will be drawn up accordingly, costs to be paid out of the estate.

Solicitors: *F. B. Wilkinson, Rowley & Hills, John Dawson & Son.*

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GREEN AND OTHERS v. FLETCHER AND OTHERS.

April 12. *Imputed notice—Fraud in principal—Solicitor—Knowledge of principal's fraud—Distinction between right to sue and equitable estate—Acquiescence—Innocent purchasers for value.*

Manning, P.J.

W. purchased certain lands from plaintiffs under circumstances which amounted to fraud on his part, and C. acted as his solicitor in the transaction. W. afterwards sold the land in question to defendants, who had no knowledge or actual notice of W.'s fraud, but C. acted as their solicitor. The plaintiffs sought to impute to the defendants, through C., notice of their right to sue to have the conveyance to W. set aside, on the ground of fraud.

Held, on appeal, that the plaintiffs must fail, since C. either knew of W.'s fraud or of some circumstances suspicious enough to make him unwilling to divulge them to a subsequent client, in either of which cases the rule laid down in *Kennedy v. Green* would apply; or else he knew no more than that the plaintiffs had a right to sue to have the conveyance from them to W. set aside, in which case the doctrine of imputed notice did not apply.

Held, also, that, as against the defendants, the plaintiffs had lost their right of suit by acquiescence.

The Court will not extend the doctrine of imputed notice.

Decree of *Manning*, P.J., upheld.

THIS suit was instituted to set aside a conveyance of certain lands by Brown to the defendants, on the ground that the defendants were affected through Capper, the solicitor, who acted for them in the purchase of the land, with imputed notice of a fraud practised on the plaintiffs in the purchase of the same lands from them by one White, for whom Capper was at the time acting as solicitor. It was admitted that the defendants had no actual notice of the fraud in question. The suit was heard before Sir W. M. Manning, P.J., and on the 12th of April, 1886, he delivered his judgment (in which the facts of the case are fully dealt with) as follows:—

SIR W. M. MANNING, P.J. This suit is in the name of the plaintiff, John Green, in virtue of his being administrator of the estate of his deceased wife, Abigail Green, and of his acts in that capacity; but it must be regarded in Equity as that of Mrs. Green's three children, for whom (as administrator of her real estate) he is a trustee.

The defendants are Alexander Brown, of Newcastle, and Messrs. Fletcher, Stokes, Sweetland, and Law, the present proprietors of the Ferndale Colliery, near Newcastle, the sale of which to them by defendant Brown forms the subject of the suit of *Harper and another v. Brown and others* (including the other present defendants), which was heard by me last year, and is still pending under appeal. The purpose of the present suit is to obtain a decree setting aside a conveyance made on the 12th April, 1876, by the plaintiff as such administrator, to a predecessor in the defendant's title, named White, a merchant at Newcastle, of certain blocks of land now constituting part of the Ferndale colliery property ; and the grounds of suit are that the conveyance was obtained fraudulently and at a great undervalue, and that the defendants respectively had notice of the fraud when acquiring a title under the conveyance. The lands claimed to be recovered are three blocks, known as Nos. 2, 3, and 4, at Throsby Creek, Tighe's Hill, near Newcastle, and respectively containing 33 acres, 19 acres, and 33 acres, which lands were sworn to be now of great value, and are charged to have been so at the time of the conveyance to White. The notice by which the defendants Fletcher, &c., are sought to be affected so as to render the conveyance to White assailable as against them, is not personal, but is "*imputed*" to them by reason of the knowledge possessed by the solicitor whom they employed in obtaining their title and conveyance, and who had been previously employed in the several transfers by which the lands had passed to White and from White to Brown. The first of these was the conveyance which is now impugned. The second was a conveyance of the same lands by J. S. Willis to White (which will be further mentioned), dated 25th April, 1876 ; and the third was a conveyance executed in April, 1880, by White and others to defendant Brown by way of trust with certain powers of sale, under which he conveyed to these other defendants in October of the same year. As Mr. White had no longer any interest in the lands sought to be recovered by this suit, he was not made a party to it ; and thus, although the principal subject of inquiry affects his reputation, and in a less degree that of Mr. Bingle, his mercantile partner, they had no power to take part in

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1886. the inquiry ; and as moreover neither of the actual parties to the
GREEN suit thought fit to call them as witnesses, there is a danger of
FLETCHER. injustice to them, through the absence of such explanation as
Manning, P.J. they might have been able to give. Mr. White has, indeed, been
in England from a time anterior to the commencement of this
suit, but he might have been examined under a commission if
the defendants had thought fit ; but this was not done ; and Mr.
Bingle was in Court at the hearing, and was (as has been
intimated to me since the hearing) ready to have given evidence
if he had been called. This is very embarrassing to the Court,
and certainly calls for as much reservation in favour of these
gentlemen as is possible ; but I have, nevertheless, to decide the
issues raised in this suit as between the actual parties and upon
such evidence as they have chosen to produce. The history of
the case as established by the evidence (laying aside small
differences of memories and giving my own conclusions on such
few contradictions as arose in the evidence) is as follows :—In
1840 a Mr. P. L. Campbell acquired from the Crown by deeds of
grant the three parcels of land now in question, together with a
fourth, adjoining No. 2, which was numbered 1 ; and in the
following year he executed a mortgage with a power of sale, of
those lands and two town allotments of small value, to Gordon
Sandeman to secure 2500*l.* and interest. In 1842 the latter
assigned the mortgage to Arthur Willis, and in 1843 Arthur
Willis assigned it with other properties by deed of assignment
executed by himself and his co-partners in trade to three trustees
upon trusts for the creditors of his firm of Willis, Sandeman & Co.
Of these three trustees Mr. J. S. Willis is now, and was in 1876,
the sole survivor. The trustees placed the four parcels of land
in the hands of a Mr. Stubbs for sale, under the power of sale in
the mortgage ; and in 1845 Mr. Stubbs sold them by private
contract to one Entwistle, of Newcastle, the father of Abigail
Green, for say 140*l.*, and received a deposit, leaving the balance
to be secured by mortgage at two years. Entwistle was imme-
diately let into possession. He had bought for himself and one
Robson jointly, and they divided the purchase between them,
Robson taking Nos. 1 and 3, and Entwistle Nos. 2 and 4. They
forthwith erected small houses on Nos. 1 and 2 respectively, and

fenced in the other allotments in connection with those blocks. Entwistle died intestate fifteen months after the purchase, leaving a widow and an only child, Abigail (afterwards Abigail Green, by marriage with the plaintiff), who became his heiress under the then existing law of inheritance. Some time after Entwistle's death his widow and Robson went to Sydney and saw Mr. J. S. Willis, apparently the more active trustee, to whom they offered payment of the balance. It was, however, refused on some ground, which they understood to be that the trustees were at variance; but they were told by Mr. Willis to the effect that they could go on holding the land, and that they should not suffer. Mr. Willis in his evidence before me denied this offer of payment, although he admitted that some Entwistle had come to him about something he could not recollect. I do not rely on his memory, and I believe the fact to have been as alleged. In 1846, the contract was given into the hands of a Mr. Parry Long, a Sydney solicitor; and it appears by a letter of 8th August, written by Mr. J. S. Willis as trustee, to Mr. Norton as solicitor for the trust, that a conveyance under the contract with Entwistle was then contemplated, and that the title deeds were sent to Mr. Parry Long for that purpose. For some unexplained reason, however, nothing was done, and eventually the contract was, as there is reason to believe, lost in a fire at Mr. Long's office. From that time, Robson and the Greens do not appear to have offered or to have been asked for the balance of the purchase money, and the lands remained in the possession of Robson and of Entwistle's family, without disturbance, and without conveyance. Altogether, it is clear to me that the title of Entwistle's representatives, and of Robson through him, to their respective parts, was and continued to be complete, in Equity, subject to the payment of the balance of purchase money, up to the time of the transactions with White in 1876; whilst, however, the legal estate remained in the assignment trustees, for want of a conveyance. I am also satisfied that Robson, and Entwistle and his representatives, held and retained up to 1876 such a possession as was sufficient against all the world, when taken in connection with their equitable title, and even independently of title, under the *Statute of Limitations*. In or before 1875, White appears to

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1886. have discovered that the lands still stood in the names of the
GREEN assignment trustees, and he thereupon negotiated with Mr. J. S.
v. WILLIS for the purchase of all four allotments ; and, in August,
FLETCHER. 1875, he obtained from Mr. Willis a contract for the sale of them
Manning, P.J. to him for 250*l.*, and paid him a deposit of 56*l.* At this time
another of the trustees was supposed to be alive in England, and,
accordingly, a conveyance from him and Mr. Willis jointly was
prepared, and was signed by Mr. Willis and sent home to
England for the other signature. The conveyance purported to
be on a contract for sale under the power contained in Mr.
Campbell's mortgage, and did not purport to assign Campbell's
mortgage debt, which fact will be seen to be material in con-
nection with the representations which will be shown to have
been made by White to the Green family. Mr. Willis stated
that he knew of the sale to Entwistle, but thought it had been
forfeited and that he must have so informed Mr. White ; but the
price to be paid by White to Willis was grossly inadequate for
the lands with a good title. The other trustee was found to be
dead, and afterwards Mr. Willis, as sole surviving trustee,
conveyed to White in the same terms. That was the deed of
25th April, 1876 ; but in the interim, that is to say, in January,
1876, White had set himself to acquire such rights as might be
in the persons in possession, and in that interim he had the
dealings with the Green family, which, as will be seen, resulted
in the plaintiff's conveyance to him. Some time before this Mrs.
Abigail Green had died intestate, leaving two daughters and a
son, and the legal effect of her death intestate was that her
interest in these lands became the subject of administration under
our Act for the distribution of intestates' real estate, but that her
three children became beneficially entitled as sole next of kin,
subject to a life tenancy by the curtesy in her husband. The
latter was, as her widower, entitled to take out administration,
but no steps had been taken by him for that purpose, nor were
any contemplated. The whole family were of the class of coal
miners, and were apparently quite ignorant of law beyond under-
standing that the children had become entitled to the land. The
father was a man who could neither read nor write, and was of
small intelligence. He had not been living with his wife or his

family for years, and, as he stated, and as I believe, he took no interest in their affairs, and on his own part he had not the least idea of his tenancy by curtesy, or of his having any sort of personal interest in the property. In January, 1876, the daughters were respectively of the ages of about 20, and under 19, and the son was only 17. The eldest daughter was married to a coalminer named McNaughton, the other was in service, and the son was a wheeler in a coal mine. The representations which led ultimately to the plaintiff's conveyance began in or before the early part of January, 1876, and were made first to Robson, and then through him to young Mrs. McNaughton, through whom again they reached her sister, brother, and husband, and possibly her father; and these all appear to have relied on her and to have allowed themselves to be led by her in the matter. She was approached by Mr. Robson, on behalf of White, after Robson had made his own terms, as he thought, with White to surrender No. 3, on condition that he should receive a confirmation of title for No. 1. White had begun by sending for Robson and telling him that he had got the deeds for the four lots, but that he knew that he (Robson) had a house on the land, and that he wished to arrange with him; and thereupon Robson told him of Entwistle's purchase from Stubbs, as agent of the trustees, and of the payment of the deposit money, and the offer of the balance by himself and Mrs. Entwistle, and its refusal by Willis, and of the division between Entwistle and himself, and the interest of Mr. Green's children under Entwistle. White, however, said that there had been a mortgage on the land, and that he had the deeds; and he told Robson that if he would assist him with the Greens to get their interest, he would give them compensation, and he would give him, Robson, the deeds of No. 1 on his also foregoing any claim to No. 3. To this Robson agreed; and he undertook to see the Greens under instructions which Mr. White gave him, particularly about the mortgage. Robson then called on Mrs. McNaughton, taking with him her husband's father. He began by saying that he had bad news for the family, that Mr. White had bought the mortgage belonging to the land, and they were going to lose all claim to it; but he thought that if they would give up possession

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1886. without any bother, Mr. White would give them a small recompense. Mr. McNaughton, sen., then suggested that they should take 100*l.* each, rather than lose all, and Robson said he thought White would give it to them rather than to the lawyers if they would part with the land quietly; and he advised that they should take those amounts, as they would have no chance in fighting about it. Mrs. McNaughton would give no answer then, but said she would think over the matter. Soon afterwards Mr. Bingle came to her house on behalf of White, with a paper for signature, which he left with her; and in evident pursuance of instructions from White, he told her it would be better for them to give up quietly rather than go to law, and that White had bought the mortgage deed from the original owner (as Mrs. McNaughton had understood him to say), and that his title was better than theirs. She did not sign the paper, nor was that particular paper at any time signed. She afterwards told White she could do nothing without Mr. Slater, a solicitor who had acted as trustee for the family. White replied that Slater was nothing to him; that the land had cost him a deal of money, and he must have it by fair means or foul (meaning, I hope, by submission, or by adverse proceedings at law), and would not wait any longer, but that he would rather give them, the Greens, 100*l.* each than go to law. Mrs. McNaughton went, however, to see Mr. Slater, but she found him ill and greatly out of temper, and he expressed himself tired of the trust, and ordered her away. She then again saw Mr. White and told him what Mr. Slater had said, which fact is material, inasmuch as the defendant's counsel laid much stress upon the family having had Mr. Slater for an adviser. White said to her in reply, that Mr. Slater was "a wise man to have nothing to do with it, as he knew he could do nothing against the title." On this occasion, or subsequently, Mrs. McNaughton agreed to White's terms and arranged for a meeting at White's office, at which her father and brother and sister should be present. Before that meeting, she called, with her husband, at White's office, to sign a new paper which had been prepared by White's solicitor, and which was afterwards signed by the others. On this occasion White asked McNaughton if he was

willing for his wife to sign, and on his saying he supposed so, White said that there was no supposing about it—that he must say “Yes or no.” Upon this he said “Yes,” and they both signed. After this Mrs. McNaughton, her father, sister, and brother met on the 18th January at White’s, and at that meeting White’s solicitor was present with the paper last mentioned, but the Greens had no solicitor or other independent adviser. On this occasion White stated, in the presence of all, that “he had a better title than theirs, that he had bought the mortgage deed, and they had lost all claim to the land, and that any payment to them was only a matter for his consideration, and that he was going to give 100*l.* to each as a present, rather than pay it to the lawyers, and that he would do so out of consideration for their having been in expectation of getting the land and for their giving it up without any bother.” The young people evidently believed all that was said, and supposed that their title was gone by reason of some superior right under some mortgage, and they said they would rather sign than go to law, and they agreed to take 100*l.* each, and were told that they should be paid when they came of age. Ultimately, the document was signed by the father as a marksman, by the three children of Mrs. Green, and by White, and was witnessed by White’s solicitor. In consequence of old Green’s inability to read or write, a Mr. Wallace was sent for to explain the document to him, and to witness his execution as a marksman; and he came, but, for reasons which do not appear, he did not so attest. The attestation of old Green’s mark is by White’s solicitor, and is without the usual declaration that the document had been read over to him and explained so that he understood it. It will be material to set the document out in full, because it has the stamp of one-sided and able legal preparation, and because it shows upon its face that the solicitor who prepared it and through whom notice of the fraud is now imputed to his subsequent clients, had the fullest knowledge of many of the most material facts—such as the fact that Mrs. Green and her daughter had some title to the land, that the transaction was put upon the legal basis of sale, and that the arrangement was with the daughters and son, although under age, and not with their

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father legitimately as administrator; also the fact that there was then no administration, but the solicitor had seen the occasion that there would be for getting the father to administer in order to give a title on their behalf. It also shows the fact of the postponement of payments to the children until they should come of age without any security being provided for such payment. All this knowledge, together with that which, as White's solicitor, he cannot have failed to have heard of White's true legal position with Willis, and in regard to his alleged superiority of title to the land, and his hearing White's untrue representations of overwhelming title, go to make up the alleged knowledge of wrongdoing with which it is sought to fix his later clients. The document was very formal in appearance, and purported to be a memorandum of agreement made on the 13th day of January, 1876, between John Green, miner, of the first part; John McNaughton, miner, and Dorothea McNaughton, his wife, Maria Eleanor Green, spinster, and John George Green, of Hamilton, wheeler, of the second part; and E. A. White of the third part; whereby the "said parties thereto of the first and second parts agree to sell to White, and White agrees to purchase all their right, title, and interest in these four allotments of land (describing them) for 300*l.*, to be paid in equal proportions to the parties thereto of the second part on the execution of a conveyance or conveyances to be drawn by and to the entire satisfaction of —, solicitor (the solicitor referred to, and whom I do not name because he has since died). And John Green thereby agreed to apply for letters of administration (if required) to the estate of the late Abigail Green, his wife, and to execute any conveyance after obtaining the same. And Dorothea H. McNaughton, Maria E. Green, and John William Green thereby agreed and bound themselves to execute any conveyance or assurance of the said land when they respectively attained the age of 21 years to the said White, or to any person he might appoint." Not only was no security given for the due payment of the several sums of 100*l.*, but it does not appear that any copy of this agreement was given to them, or any of them. They seem to have taken everything on trust and confidence. Two days afterwards Mrs. McNaughton was taken

before a Commissioner of the Supreme Court, and acknowledged the agreement apart from her husband. After the signature of the agreement, and evidently before the completion of it by the plaintiff as administrator, Mrs. McNaughton said to White that if her mother had been alive things would not have been as they were; to which he replied, "Bless your heart, your mother's title was nothing to mine." Mrs. McNaughton was subsequently paid 100*l.* in three sums; but neither her sister nor brother have ever received any part of their sums of 100*l.* each, nor were any of the three asked to execute a conveyance on coming of age. The next step after the signature of the document on the 13th January was that White's same solicitor, and at his expense, got out letters of administration to John Green, dated 7th April, 1876, in respect of the intestate estate of Abigail Green; and for this purpose he got Green to sign all necessary documents, and procured bondsmen for him at the Court, of whom one was the defendant Brown, an entire stranger to Green; and after this Green was induced to sign two deeds prepared by the solicitor, and dated respectively on the 12th April, 1876. One of them purported to sell and convey to White Green's interest as tenant by the curtesy, for 5*l.*, and in that deed it was recited that on the death of his wife, Abigail Green, he had become and then was seized of or well entitled to the lands for and during his natural life as tenant by the curtesy; and that he had contracted for sale to White. The other, which is the deed now impugned, recited the death of Abigail Green intestate, and the letters of administration to Green as the widower of Abigail Green, and that Abigail Green was "at the time of her death seized of or well entitled to an estate of inheritance in fee simple of and in the said lands and appurtenances." And then it recited a contract by him for the sale of the said lands, &c., to White for 300*l.*, and purported to convey the lands, &c., in fee to, White as upon a thereby acknowledged payment of 300*l.*, and at the foot of the deed he was led to put his mark to the receipt for 300*l.*, in the presence of a magistrate. He did not, in fact, receive the 300*l.*, or any part of it, but he received the 5*l.* and also on two occasions a sovereign to "obtain lunch," as he said, whilst waiting for papers to be ready

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1886. for him. He was not only unable, as already stated, to read and
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" he was to do what his children had agreed to, and he does not
FLETCHER. seem to have exercised the least amount of independent will.
Manning, P.J. Of his incompetence and blind submission to the dictation of
White and his solicitor there can be no stronger proof than his
conveying away a life estate in himself for the nominal sum of
5*l*.—an amount probably put in to give to the conveyance the
character of a conveyance for valuable consideration. He says
he did not know that he had any interest, and his relations with
his family were hardly such as rendered it probable that he
would have surrendered his life interest for their sakes if he had
known of it. The conveyance by Willis to White of the 25th
April, 1876, purported, like that prepared in 1875, to be on a sale
under the power contained in Campbell's mortgage, and not to
be an assignment of the mortgage and mortgage debt. There-
fore White cannot have been justified (either by the prior
uncompleted deed or by any prospective expectation) in saying
that he had "bought the mortgage;" nor is it in the least pro-
bable that before the execution by Willis of the conveyance of
the 25th April, and the payment then purported to be made of
the balance of purchase money beyond the deposit of 500*l*., he
had, as he represented in January, "got the deeds." Green's
conveyance, as well as Willis's, were registered for White, not,
however, in their own order of date, but at such dates as gave
priority to the latter; those from Green not being registered
until the 11th May, 1876, while that from Willis was registered
on the 1st of that month. At the time of the dealings with the
Greens, the lands in question were of far greater value than the
300*l*., if it had been paid. The actual value was the subject of
very differing estimates, the highest being that of Robson, who
said that No. 2 was equal to No. 1, and that No. 1 was worth in
January, 1876, some thousands, and had since produced 7000*l*.
I do not attempt to put any particular value on the lands,
but I have no doubt that 300*l*. was grossly inadequate as a true
price for them, and only reasonable in the way in which White
put it, that is to say, as a bonus for submitting to a superior
title without contest, or as "a present." or *solatium* for defeated

expectations. I am also quite satisfied that the young people of the Green family agreed to take 100*l.* each only by reason of their believing the bold representations of White that he had obtained some title under a mortgage, by which their title had been completely ousted. White, after getting the conveyance from Green, brought an action to turn out a tenant of No. 2, and paid him 100*l.* to retire without resistance. This and the 100*l.* to Mrs. McNaughton, and 7*l.* to John Green, and, presumably, his legal costs, were all that White paid; and it appears, on the other hand, that he got 500*l.* from Robson for conveying No. 1 to him, notwithstanding Robson's original understanding that he was only to surrender No. 3 for a confirmation as to No. 1. In 1879, young M'Naughton and young Green, declaring themselves to have been defrauded, made a forcible entry into the lands, and were prosecuted for it by White, and tried at the Newcastle Quarter Sessions. White's same solicitor was called for the prosecution, but the jury acquitted the young men on their claim of right. Long before this, and indeed shortly after Green's conveyance, the defendant Brown is found to have been connected with White by way of advances for working for coal on land, and from the time of such first advances I gather that he was associated with White, or White and Bingle, as a financier, down to the execution of the trust deed of April, 1880, under which he sold to the other present defendants. He swore, however, that he had no connection with White in the matter of his dealings with Green when he became bondsman for Green as administrator; but as he certainly had no connection with Green, it cannot be doubted that he became such surety either at White's instance or on his behalf at the instance of a solicitor. In fact that solicitor conducted the whole matter of the administration on White's behalf, Green being merely passive in his hands. Having now given very full attention to the question of fraudulency in this transaction, I have no hesitation in saying that, according to the evidence placed before me, it was fraudulent in the eyes of Equity, although to many persons it might appear nothing more than smart business. The imputation, so far as it can affect the title of the defendants, rests upon White alone, as he alone is their predecessor in the title. Anything

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done by Mr. Bingle (who is not known to have been personally interested in the transaction, though associated with White as a mercantile partner) can only be material as being the act of an agent employed by White to make communications, or to do acts at his instance; and it is even consistent with the evidence that Bingle may not have been personally cognisant of any wrong design on White's part, and that he may have taken White's word, or that of the solicitor, for the representations made to him as to White's title. This, however, is legally immaterial, as it is enough that he was manifestly acting as White's agent, so as to fix White with responsibility for his actings and sayings so far as they were material. The transaction being of the character I have above declared, it follows that a Court of Equity ought now, if the question be open to it as between the present litigant parties, to declare it void, and order it to be set aside. The following are the main grounds for my opinion:— That White knowing from Robson, and more or less from Willis, of the earlier title of Entwistle and his representatives, both by contract and possession, and knowing that his own title was precisely of the same character, but of 30 years later date, induced Mr. Green's daughters and son to surrender their titles to him on untrue representations that he had purchased some mortgage and had obtained the deeds of the land, and had thereby acquired a title which had wholly defeated theirs, and instead of fairly purchasing their interests, led them to believe that they had only to decide whether they would take the 100*l.* each, or drive Mr. White to the expenditure of as much money in legal costs of ejectment. Second. That the persons with whom he thus dealt were all under age at the time, and ignorant and credulous, and therefore susceptible of influence by his bold assertion of superiority of title, and were perhaps open, from their youth and position in life, to be tempted by such a bait as the promise of 100*l.* each for quiet submission. Third. That their misleading was helped by Mr. White's employment of the services of Mr. Robson, as an old family friend, and one apparently in the same position as themselves. Fourthly. That they had no legal assistance, nor any independent advice possessing any value, but were led to place themselves wholly in the

hands of Mr. White and his solicitor. Fifth. That the sums promised amounted to a grossly inadequate consideration for the interests passed by Green, deceased. Sixth. That the terms by which they agreed to relinquish their rights were prepared exclusively by Mr. White's solicitor, and were almost wholly one-sided, even to the extent of giving them no security for the postponed payments promised to them, whereby they were exposed to the event, which has in fact happened, of two of them never being paid any part of their 100*l.* each. Seventh. That John Green, the father, was, and must have been seen and known to be ignorant, illiterate, and without comprehension of his own or his children's rights, and a mere instrument in the hands of White and his solicitor; and that he was used as such in the obtaining of administration, and in getting his execution of the deeds, whereby respectively he released his tenancy for life and the estate of Abigail Green. Eighth. That both such deeds were obtained by undue influence, by or through White's solicitor, and without Green's having separate legal advice, and that the purchase-money for Mrs. Green's interest was neither paid, nor secured to be paid, but that, nevertheless, he was made to acknowledge full payment before a magistrate. Ninth. Even the subsequent fact of non-payment to the younger sister and brother, as a sequence to the opportunities thus given for evading the payment, may be regarded as a badge of general fraudulence. Altogether, I am so entirely dissatisfied with the transaction that I could not allow it to stand if the proper parties were within my reach, but I should restore Green and the daughters and son to their original position, and probably even decree conveyances to the latter, on payment of the balance of their purchase-money and interest to Willis or White. But, as the original parties are not before me, I have yet to consider how the defendants stand affected by the fraud. On this part of the case the first question is as to the knowledge possessed by the solicitor who has been common to both White and the defendants, of the facts going to make up the equity of the Greens. Upon this point I have no doubt. He obviously had knowledge of almost every material fact, and if there be any of which actual knowledge has not been shown, he had ample notice of them. He

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must therefore be taken to have been cognisant of the fraud, and of the resulting equity, at the time he acted with reference to the same lands as solicitor successively to Brown and to the other defendants. Also, I have no doubt that his knowledge and notice must have been fully present to his mind when he acted for the defendants Fletcher, &c., in obtaining their title. The facts were too marked to have escaped his memory, especially as they had been recently brought under his notice in the proceedings against McNaughton and John W. Green for forcible entry. Lastly, however, comes the question whether his knowledge or notice is to be imputed to the defendants, Fletcher, &c., so as to affect Brown's conveyance to them; and herein is the great difficulty of the case on legal grounds. It does not appear whether or not their title purported to be taken under Green's or Willis's conveyance; but I do not see that this is material, as both formed parts of one combined title, which were worked together as the means of completely ousting the Greens, and were procured through the same solicitor, and both were on the Register of Titles. If there were any difference in respect of the source of the title actually taken, it would, perhaps, be more unfavourable to the defendants under Willis's conveyance, for that was clearly taken with knowledge of a prior equity, by contract, in Entwistle; but, in fact, the title must have been taken by the solicitor under both conveyances—on that of Willis's as conveying the legal estate, and a full apparent fee at law and in equity, and as having priority of registration—and on that of Green as an extinguishment of the equity under Entwistle's prior contract. Under these circumstances, this refined distinction arises,—which distinction appears to me material to the present point,—that Entwistle's equitable estate had been conveyed and had become vested in White; and that what remained in the Greens was not and is not an "estate" in equity, but a right to come to the Court of Equity for relief against an executed surrender and conveyance of that estate under the pressure of fraud; which right rests on the option of the defrauded persons to assert it in the Court, and upon the view which the Court might take of the grounds of equity. It also rests, in theory at least, upon the authority of a Court of

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Equity to operate on the conscience of the defendant, rather than upon the land or title. It therefore comes to this: Is there any authority for "imputing" to a purchaser his solicitor's knowledge of an equity which does not constitute an estate, but only gives a right of suit in equity? This distinction is, as I have said, refined, and was not noticed in the arguments of the eminent counsel who conducted the case; and I am consequently free to admit some misgivings as to its legal materiality. Subject to such misgivings, however, my opinion is that it is material to the application of the decided cases on the subject of imputed knowledge or notice; and I must therefore deal with that question accordingly. There are, however, other points also which must be noticed before finally disposing of the question. One is that Brown's title appears to have been derived from others as well as White; that is to say (as appears by the deed of trust in his favour) from Harper, and Beavan, and Bingle. I will not notice Bingle, particularly as he was sufficiently associated with White to have fixed him largely with notice. But in the case of Harper and Beavan is different. It may be—and there is no evidence on the subject—that they had acquired an interest from White without actual or imputed notice of the fraud charged on White; and in that case their title, whatever it was, would stand good in their hands, and consequently in those of any person to whom they conveyed. Thus the question of imputed notice to the defendants would not, upon the evidence before me, apply to the interests of Harper and Beavan; for it has been held, on obviously sound grounds, that if a man has a good title, by reason of the absence of notice to him of an adverse equity, he can pass it on with an equally good title, even to a person with notice; for otherwise his title would be unmarketable, and therefore not really good. See the observations of *Fry, J.*, in *Kettlewell v. Watson* (1). On the other hand, I think that the intervening title in Brown would not protect the other defendants; though it should be thought that he had no notice of the plaintiff's equity, inasmuch as he was, and was known to be, a mere trustee to sell and convey under the title placed in his charge, and was not a purchaser for value. Subject to these

(1) L.R. 21 Ch. D. 707.

1886. remarks, I have now to consider the authorities as to "imputed" notice or knowledge. Those cited before me, and on some further search I find none more pertinent, were the following:—
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(2) L.R. 6 Ch. 678.

(3) L.R. 9 Ch. D. 189.

(4) 3 M. & K. 693.

(5) L.R. 21 Ch. D. 685.

(6) 32 L.J. Ch. 783.

(7) L.R. 20 Eq. 288.

(8) 2 W. & T. L.C. 32.

(9) L.R. 4 Ch. 40.

(10) 1 M. & G. 446.

(11) 1 Kean, 159.

(12) L.R. 2 Eq. 139.

(13) *Supra*.

doctrine itself is unquestionable." So in *Rolland v. Hart*, Lord *Hatherley* says: "The purchaser of an estate has in ordinary cases no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance, because he is not told of it by his solicitor."

And, again, he says, "When a solicitor is so employed, the knowledge of the solicitor is the imputed knowledge of the client." So in *Kennedy v. Green, Bacon, V.C.*, says: "If a professional man is employed in a transaction, the law imputes to the client who employs him the knowledge which the solicitor employed possesses." There are exceptions, as where the transaction is remote in point of time or other connection, from that of which the solicitor had knowledge at some former time, or in some other transaction; but Lord *Langdale*, M.R., in *Hargraves v. Bothwell*, said, "he was clearly of the opinion that where one transaction was closely followed by and connected with another, or where it was clear, as in the case then before the Court, that a previous transaction was present to the mind of the solicitor when engaged in another, there was no ground for the distinction by which the rule that notice to the solicitor is notice to the client had been restricted to the same transaction." And in this case it is clear to me, on grounds already stated, that the previous transaction between White and the Greens cannot fail to have been present to the solicitor's mind when acting for the defendants, Fletcher, &c., in settling their purchase. If, therefore, the equity which in the earlier part of this judgment I have assigned to the Greens, be within the rule, I should not hesitate to impute to the defendants the knowledge of the solicitor concerning the transaction with White. But here I come to what I have called the refined distinction between an equitable estate or interest, and a right of suit for relief against the executed conveyance of an estate or interest which had been previously possessed; and as I find no disposition in the Courts to give any extension to this doctrine of imputed notice, I have thought it necessary to look closely at the decided cases to see whether it has been applied to such a case as this. Having done so, I have failed to find any corresponding case. In all the authorities there appears to have been some knowledge of a prior equitable

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estate, or interest, under some unregistered conveyance or mortgage, or under some contract, or other definite equity ; and the knowledge transmitted, as it were, from the solicitor to the client appears to have been of some simple fact creating an equitable estate or interest ; and in none do I find that the notice was of an aggregation of facts which might, on suit for that purpose, induce the Court to restore a right or estate which has been formally surrendered by its owner. I am not prepared to say that there can be no case in which the Court would not impute notice of a fraud by which such surrender had been procured ; and, indeed, I cannot see why, on any ground of principle, the distinction should be permitted to exist ; but I find no authority for going beyond the simpler matters of knowledge which I have mentioned, and in this particular case, upon a review of all the circumstances, including the delay to sue until the property had acquired a largely increased value by mining operations, I am not prepared to hazard an extension beyond the letter of the authorities. If, on appeal, the Full Court should take a different view of the law in its application to this case, and should create what I conceive would be an advanced precedent, such a ruling would not be unacceptable to me ; and indeed, one of my reasons for having so fully stated the facts and my views upon the question of fraud by White, has been that the Full Court, if appealed to, may see precisely what the original fraud was, and what is its position and applicability to the doctrine of imputed notice. On my own view of the case, and under the pressure of the authorities, though certainly with hesitation, I must, notwithstanding my decision as to the fraud, hold the title of the defendants to be clear of it ; and must therefore decree in their favour. But I am not disposed to give them costs as against the plaintiff. Probably it would be useless if I did ; but also I have decided in the plaintiff's favour the main question of fact on which the parties were at issue ; and I cannot relieve the defendants so fully from the effect of their solicitor's knowledge as to annex an award of costs to their success on the legal point. And further, I cannot disguise from myself that some or all of these defendants may have acquired from the Newcastle papers some personal knowledge of the then recent

trial for forcible entry, and of the grounds of successful defence in that prosecution. The decree will be for the defendants, without costs.

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From this decision the plaintiff appealed on the following grounds:—That his Honour was in error in holding that the equity of the plaintiff and his children (which his Honour held to have been in point of fact established by the evidence) was not within the rule of constructive notice, and that on the facts and issues found and determined by his Honour in the plaintiff's favour, the plaintiff was entitled to the decree claimed by him. The appeal came on for hearing before the Full Court (FAUCETT, INNES, and DEFFELL, JJ.) on the 15th of August, 1887.

Walker (*Heydon* with him) in support of the appeal.

Owen, Q.C. (*G. Knox* with him), for the respondents (defendants).

The following authorities were referred to in the course of the arguments:—*Kettlewell v. Watson* (14), *Kennedy v. Green* (15), *Bradley v. Riches* (16), *Oave v. Oave* (17), *Phillips v. Phillips* (18), *Roland v. Hart* (19), *Hewitt v. Loosemore* (20), *Waldy v. Gray* (21), *Thompson v. Oartwright* (22), *Prosser v. Edmonds* (23), *Jones v. Smith* (24), *Wyllie v. Pollen* (25), *Borell v. Dann* (26), *Wall v. Bright* (27), *Le Neve v. Le Neve* (28), *White v. Wakefield* (29), *Hunter v. Walters* (30), *Atterbury v. Wallis* (31).

FAUCETT, J. As we have come to an unanimous conclusion in this case, we have decided to give our judgments at once, instead of reserving them. The facts of the case are so fully stated in the judgment of his Honour the Primary Judge, that there is no necessity to refer to them at any great length on the present occasion.

Faucett J.

(14) L.R. 2 Ch. D. 704.

(15) 3 M. & K. 699.

(16) L.R. 9 Ch. D. 189.

(17) L.R. 15 Ch. D. 639.

(18) 4 De G.F. & J. 208.

(19) L.R. 6 Ch. 678.

(20) 9 Ha. 449.

(21) L.R. 20 Eq. 238.

(22) 33 Beav. 178; and 2 De G.J.
& S. 10.

(23) 1 Y. & C. 481.

(24) 1 Ph. 254.

(25) 4 De G.J. & S. 596.; and
32 L.J. Ch. 782.

(26) 2 Ha. 440.

(27) 1 Jac. & W. 494.

(28) Tudor L.C. p. 32.

(29) 7 Sim. 401.

(30) L.R. 11 Eq. 292; L.R. 2
Ch. 75.

(31) 8 De G.M. & G. 454.

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This seems to be a claim to set aside a deed executed by Brown in favour of the defendants, by which certain lands forming part of the property now known as the Ferndale colliery were conveyed to the defendants. It is worthy of notice that the plaintiff seeks to set aside not the deed executed by himself, but that executed by Brown; or, in the words of the statement of claim, the Court is asked to declare that the defendants hold the lands as trustees for the plaintiff. The Primary Judge, having evidently considered the case with great care, dismissed the claim, though he came to the conclusion that White had been guilty of fraud in the transactions between him and the plaintiff in 1876. Now, we have to consider whether his Honour was right in coming to that conclusion, because the question as to whether White was or was not guilty of fraud goes to the root of the whole matter. If there was no fraud in White's conduct, then of course the plaintiff's claim must fail; but we are of opinion that the finding of the Primary Judge on this point cannot be disturbed. The evidence on this point may appear to be slight in itself, and the statement of the plaintiff may be considered not altogether satisfactory, but it is strengthened by the evidence of the younger Green and Robson, more especially the latter, as it may be considered probable that he would be in favour of White's view of the question rather than that of the plaintiff. The fraud alleged against White is that he falsely represented to Green and his family that he had bought up some old mortgage, and obtained an interest which would enable him to turn them out. No doubt White had obtained from Willis a complete conveyance of his interest as trustee in this land; but the question is whether the documentary title thus obtained would have enabled him to succeed in a Court of law in turning the plaintiff off the land. Now what was the position of the plaintiff and his family with regard to this land at the time when White made these alleged false representations? It was this. In 1845 Entwistle contracted to buy these lands from Willis. There was a clear contract, and a deposit was paid under the contract; and there is evidence that the balance of the purchase money was to remain on mortgage of the property for two years. Now, under these circumstances,

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Entwistle may not have had a right to obtain specific performance of the contract ; but there is an additional fact which completed the right of Entwistle and those claiming under him. Entwistle went into immediate possession of part of the property, and the balance of the purchase money having been tendered, his representative was clearly entitled to a decree for specific performance of the contract in her favour. From that time till the year 1868 Entwistle and his successors in title kept possession of these allotments ; and though a period of about three years remains unaccounted for, that is immaterial as far as regards the title. Even if Entwistle and Robson had had no right to the land, the moment they took possession of it, time began to run in their favour ; and even if the land had been vacant for three years, time would still run against the owners during the vacancy, unless they took some steps to assert their rights, which they never did. In my opinion, during those three years there was no vacancy at all, since possession was obtained under a contract, and consequently the right to possession continued. There is evidence that during this period, from 1845 to 1868, various leases were made by the parties in possession, one of the lessees being one McIsaacs, who, on the expiration of his first lease, obtained a fresh one. Now, even assuming that McIsaacs paid no rent after 1868, there had at that time been twenty-three years' continuous possession of the lands, and Abigail Green had consequently acquired a good title by possession, and could not have been ejected from the land even by the original rightful owner. From this it appears clearly that there was, before the time when White came on the scene, an absolute estate in possession in Abigail Green (to which on her death intestate her three children became beneficially entitled as sole next of kin, subject to a life estate in favour of the plaintiff as tenant by the curtesy), which had been acquired originally under a contract for purchase of the property, and could not be disturbed by any one. White, then, having heard of the contract, buys what he supposes to be the outstanding legal estate, and makes certain representations to the Green family which have the effect of making them believe that he had acquired a right to the property by virtue of which he could turn them out.

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Another circumstance to be taken into account in considering the nature of this transaction, is the fact that while one of the parties to it was a business man of undoubted intelligence and ability, the other parties were ignorant, uneducated people, and two of them were infants at the time when the transaction was completed. The question, then, is whether White knew that he was cheating these people? The Primary Judge came to the conclusion that White knew of the contract under which Entwistle went into possession, and knew also that the plaintiffs, or those through whom they claimed, had been in uninterrupted possession of the land since that time, and that therefore it was incumbent on him to make inquiries as to their title; and his Honour further found that instead of doing so, White induced the plaintiffs to give up all their interest in the land for a most inadequate price, which was in fact never paid. It is true that the facts on which the Primary Judge based his conclusions, appear only from the evidence of the plaintiffs; but we know that there were several persons concerned in the transaction, notably White, Bingle, and Wallace, who might have been called to contradict the evidence given by the plaintiffs. However, they were not called, and on the uncontradicted evidence of the plaintiffs, which was all the Primary Judge had before him on this point, I am clearly of opinion that he was justified in coming to the conclusion at which he arrived.

The next question for us to determine is: was Capper guilty of fraud? The Primary Judge appears to have been unwilling to find that Capper was an actual participator in the fraud practised by White, though I think he would have been justified in coming to that conclusion. I think that Capper was largely engaged in this fraudulent transaction, and that he had sufficient knowledge of the surrounding circumstances to cause him to suspect the nature of the transaction. As White's solicitor he must have known of the contract between Willis and Entwistle, and he must also have been aware of the fact that the Greens were in possession of the land. I do not suppose that he intended to benefit in any way by the fraud that was practised, but he used his legal knowledge in assisting White to carry out a fraud which could not have been carried out without the co-operation

of some person having a knowledge of law. If Capper was aware of all the facts of the case, which White undoubtedly knew, then he was none the less guilty of the fraud because he took no benefit by it. Assuming that Capper was aware of these facts, that he was in fact guilty of fraud, the doctrine laid down in *Kennedy v. Green* (32) applies directly to this case, and the plaintiff must fail. On the other hand, let us suppose that Capper knew nothing of what had taken place previous to the transaction between White and the plaintiffs, and that consequently he was not involved in the fraud, and, in fact, had no knowledge of it. Even then the course taken by him is one which I should be sorry to see commonly followed by solicitors, and though in this case the circumstances would not be such as to suggest gross fraud as in the case of *Kennedy v. Green* (32), still, they would sufficiently arouse the suspicions of the solicitor engaged in the transaction to render it unlikely that he would impart the information he then acquired to his subsequent clients. I confess I cannot see why the principle laid down in *Kennedy v. Green* (32) should not apply to cases of this kind. It is true that in that and similar cases the circumstances showed gross fraud on the part of the solicitor; but still the principle on which all those cases are decided is that the solicitor would, from the nature of the transaction in which he had been engaged, be unlikely to impart information acquired in the conduct of that transaction to his subsequent clients. If then, the principle laid down in that case would apply to cases in which gross fraud does not appear, I am unable to see why it should not apply to the present case.

Suppose, again, that Capper, though not knowing of Green's title to the land, knew that he had a right to have the conveyance to White set aside on the ground that it was fraudulently obtained—in other words, that he recognised that Green had a right to sue, but not an equitable estate. The Primary Judge has held that in that event the doctrine of imputed notice does not apply, and that for the purposes of the doctrine of imputed notice there is a distinction between a right to sue and an equitable estate. In that opinion I entirely concur. The Courts

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have laid down over and over again that the doctrine of imputed notice should not be extended, and we know of no case in which knowledge in the solicitor of a right to sue existing in a third party has been imputed to the client. In the present case all that Capper could say would be, "Green has executed a conveyance of this property to White, but owing to the circumstances under which it was executed he has a right to sue in Equity to have that conveyance set aside." To hold that such a communication by Capper would affect a subsequent client with notice of White's fraud would be to extend the doctrine of imputed notice, and, as I have already said, that is a course the Court will not adopt.

Another ground of defence set up in this suit is that the plaintiffs have deprived themselves of their right to relief in a Court of Equity by acquiescence. The conveyance from Green to White was executed in 1876, and in 1879 Green, junior, and McNaughton were prosecuted for making a forcible entry on the lands, and were acquitted on their claim of right. At this time, therefore, they must have been aware of the nature of whatever claim they had against White, and yet it was not until the year 1884, when the value of the property in question had largely increased owing to the mining operations conducted by White and Bingle and others that the statement of claim in this suit was filed. This ground of defence, while it may be a strong one in the hands of the present defendants, who, it is admitted, had no personal notice of any right on Green's part, would not be of any avail to the original perpetrator of the fraud, and it is, I think, not necessary to the decision of the case.

The whole case may be looked at in either of three ways:—Firstly, Capper had actual knowledge of the fraud practised by White, in which case the doctrine laid down in *Kennedy v. Green* (33) prevents the plaintiffs succeeding.

Secondly, Capper, though innocent of actual fraud, still was aware of circumstances which were sufficiently suspicious to make him unwilling to divulge them to a subsequent client, in which case, also, I am inclined to think *Kennedy v. Green* (33) applies.

Thirdly, Capper was entirely innocent of the fraud practised by White, and could have told a subsequent client no more than that Green had a right to sue to have the conveyance to White set aside, in which case I concur with the Primary Judge in thinking that the doctrine of imputed notice does not apply.

In any view of the case, therefore, I am of opinion that the plaintiff's claim must fail, and that this appeal should be dismissed with costs.

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SIR G. INNES, J. I concur. I base my decision, however, on grounds broader than the refined distinction drawn by the Primary Judge in his judgment, since in my opinion the decree can be supported independently of that distinction. The case, it seems to me, must be looked at in one of two ways. The one view is that there was fraud on White's part in the transaction of 1876, and that Capper, acting as his solicitor, was a party to that fraud; and I confess that on the evidence it is difficult to come to any other conclusion—in which case the doctrine laid down in *Kennedy v. Green* (34) is clearly applicable, and must defeat the plaintiff's claim. The other view is that there was no fraud on White's part, and consequently no knowledge on the part of Capper; and in that case it would be clearly impossible for the defendants to become affected with notice, there being no fraud. In either case, then, we arrive at the same result, that the plaintiffs' claim must fail.

Innes J.

I now pass to the ground of defence set up—that the plaintiffs' acquiescence in the enjoyment by the defendants and their predecessors in title of the rights of ownership over the property in question is sufficient to disentitle them to relief in a Court of Equity. I am disposed to think that the evidence is sufficiently strong to support this contention, and the evidence shows acquiescence on the part not only of Green, but also of Green's children, who are of course virtually the plaintiffs in this case, Green being merely a trustee for them as next-of-kin of Abigail Green. Now, acquiescence cannot be proved unless it is shewn that the plaintiffs had a full knowledge of their rights. Up to a certain period, no doubt they were deluded into the belief that

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they had no right to the property in question ; but it is impossible to say that after the trial of John Green, jun., and McNaughton for forcible entry on the lands, and their acquittal on the claim of right set up by them, the plaintiff and the children had not full knowledge of any right they may have had to the land. After that time, however, we find that they remain absolutely quiescent, and take no steps at all to assert their right until the latter part of the year 1884, after the suit of *Harper v. Brown*, which related to the property now claimed, had been heard by the Primary Judge, though before his reserved judgment in that suit had been delivered. With regard to the point on which the Primary Judge grounded his decision, which is that for the purposes of the doctrine of imputed notice, there is a distinction between an equitable estate, and a right to sue in Equity. I confess I have had some difficulty in arriving at the same conclusion, although for some purposes the distinction undoubtedly exists—as is shown by the cases of *Prosser v. Edmonds* (35), *Phillips v. Phillips* (36), and *Cave v. Cave* (37)—yet I have some difficulty in seeing that for the purposes of a case of this nature there is this distinction in principle. I entirely agree with Lord Westbury when he says, in the case of *Wyllie v. Pollen* (38), that the doctrine of imputed notice is not to be extended ; but I am disposed to think that the disinclination of the Court to extend that doctrine has reference rather to the position of the solicitor as regards his client than to the exact quantum of the interest or estate which is requisite to evoke the assistance of a Court of Equity to affect a subsequent client of the solicitor with notice.

On the whole, however, I am not disposed to dissent from the judgment of the Primary Judge on this point, and I therefore concur with his Honour Mr. Justice Fawcett in thinking that the decree must be upheld, and this appeal dismissed with costs.

Deffell J.

DEFFELL, J. I concur. I may say that I agree also with all the findings of the Primary Judge on the facts of the case, and I believe that an intelligent jury would have come to precisely the same conclusions. I am also of opinion that fraud has been

(35) 1 Y. & C. 481.

(36) 4 De G.F. & J. 208.

(37) 15 Ch. D. 649.

(38) 3 De G.J. & S. 596.

distinctly proved against Capper, on whose assistance the success of the scheme to obtain this property for an entirely inadequate consideration was largely dependent. It appears to me exceedingly unfortunate that a solicitor who, no doubt, would not have been guilty of any misconduct towards his client, should have lent valuable assistance towards carrying out a scheme which must to his knowledge result in a wrong being done to these people, who, besides being ignorant of legal matters, had the additional disadvantage of not having the advice of an independent solicitor.

As to the point of acquiescence, I am of opinion that the laches of the plaintiffs was sufficient to prevent a Court of Equity coming to their assistance. It is perfectly clear that in 1879 their rights were brought to their knowledge, and they could, therefore, have sought the assistance of the Court of Equity in the course of the year 1880. In 1881 Capper died, and in 1882 the suit of *Harper v. Brown* was instituted, but it was not till after the hearing of that suit which took place in October, 1884, that his claim was propounded on behalf of Green, whose conduct throughout shows that he could not have known that as administrator of Abigail Green he was trustee for her children. I think that on the ground of laches alone a Court of Equity would refuse to assist the plaintiffs to enforce this claim, and that the appeal must, therefore, be dismissed with costs.

Decree upheld. Appeal dismissed with costs.

Solicitors for plaintiffs : *Slattery & Heydon.*

Solicitor for defendants : *T. G. Brown, by Ellis & Makinson.*

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Nov. 25. *Trust deed—Sale under power—Excessive demand—Proviso for protection of purchasers—Notice—Breach of trust—Avoidance of sale—Account when taken.*

Manning P.J. To secure advances, plaintiffs assigned to defendant B. all their interest in a coal mine on trust to carry on the same, and in certain events to sell. B. made a demand on the plaintiffs for an amount largely in excess of what was due to him under the deed, and in default of payment sold the property to the other defendants, S. & S.

Held, that B. did not stand in the same position as a mortgagee, but that he was a trustee, and that consequently he was not justified in selling the property on the plaintiffs failing to tender the amount due to him.

Held, also, that a clause in the deed of trust providing for the protection of purchasers from B., by exonerating them from inquiry, did not operate to protect them in the event of their having express notice of the breach of trust committed by B., and

Held, also (*Stephen, J., dissentiente*), that the defendants, other than B., had such notice.

THIS was an appeal from a decree of *Manning, P.J.*, whose judgment, which is fully set out, states the facts of the case so clearly that it is unnecessary to allude to them further. The judgment was delivered on the 25th of November, 1884.

Manning P.J. **SIR W. M. MANNING, P.J.** The plaintiffs in this suit are Henry Harper and Thomas Bevan, of Newcastle, lately owning and carrying on the Ferndale colliery, near that place, in partnership with the defendants, E. A. White and J. R. Bingle, under the style of "The Ferndale Colliery Co.;" and the principal defendant is Alexander Brown, of Newcastle, who, in virtue, or under colour, of a deed of trust, dated 12th April, 1880, made a sale of the colliery, and all property connected with it, to the four other defendants, in October of that year. The plaintiffs' statement of claim impugns the sale, and prays for a decree directing defendant Brown to carry out the trusts of that deed as far as the same have not yet been carried out, and that, if necessary for the purpose, the sale may be declared null and void; and that Brown and the four purchasers may be declared accountable and answerable accordingly; and that if necessary the colliery business may be wound up under the direction of the Court, and

the rights of the plaintiffs and all other persons ascertained and provided for ; and that all declarations, accounts, and directions required for these purposes may be made and given. The plaintiffs are persons who have been for 30 years and upwards engaged in practical coal-mining—Harper as a coal-mining engineer, and Bevan as a coal-miner and manager. They appear to be men of experience and intelligence in their vocations, but of less education, and quite unequal to the defendant Brown and the other defendants for the complications into which they were brought. One of them could not read or write. The defendant Brown is a solicitor, and obviously a person of much ability and strength of purpose, who had for some time past withdrawn from his profession, and had been the general commercial and financial manager of the mercantile and colliery firm of James and Alexander Brown, of Newcastle, of which a deceased Alexander Brown was formerly a member. He asserted himself to have succeeded the deceased as a partner ; but this was denied by James Brown, the survivor ; and I adopt his positive and circumstantial statement in preference to the claim of this defendant, which was not supported by any written or other evidence, and which was perhaps founded upon some erroneous legal notion of his rights as a trustee under the will of the deceased partner. I shall, therefore, throughout this case regard Mr. James Brown as the sole member of the firm since its dissolution by the death of his late partner, and the defendant Brown as his manager only, and as having no personal interest in the funds or obligations of “J. and A. Brown.” The defendants White and Bingle were landholders and merchants at Newcastle, who had been associated with the plaintiffs in the colliery upon terms which will be explained. The four remaining defendants were the purchasers from defendant Brown, and are Henry Law, his brother-in-law, then a bank manager at Newcastle, and now at Adelaide ; Charles Sweetland, another bank manager at Newcastle ; James Fletcher, the manager of Mr. Laidley’s colliery, near Newcastle ; and Charles Frederick Stokes, a merchant at Newcastle. These last defendants are all charged by the plaintiffs with having had notice of their equities at the time of purchasing. The defendant Brown, in his statement of defence, justified the sale as

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1884. having been duly made under certain powers contained in the trust deed. The defendants White and Bingle do not oppose HARPER the sale, but express themselves content with it, as they have v. BROWN. reason to be. The other defendants stand upon the validity of Manning P.J. the sale, but more particularly on a clause in the deed of trust, relieving purchasers from inquiry as to the propriety of any sale, and on a denial of the notice charged against them. The case was heard before me on April 28 and 29, and May 1, 5, 8, 12, and 13, for general evidence and argument; and on May 28 and June 8 for an examination of accounts, which I took personally, for purposes essential to my general decision. Since then I have given a very great deal of time to the consideration of the case, but have been too much occupied otherwise to conclude my deliberations and to prepare this judgment until now. The evidence having been heard by me orally without a jury, and the accounts, so far as they have been gone into, having been taken by myself under the Court's general authority and according to the *Equity Act* of 1880, it devolves on me, as upon a jury, first to determine the general facts and the position of accounts between the parties. Therefore, the facts and figures which I shall give must be taken to be judicial conclusions from the evidence. The plaintiffs had, for 16 years prior to May, 1877, been looking out for indications of payable coal in the neighbourhood of Ferndale; and believing that they had ascertained its existence in 65 acres of land belonging to defendants White and Bingle, and in other adjacent lands, they obtained leases of those lands at royalty rents. The first lease was from White and Bingle, and was for 60 years, at a royalty of 6d. per ton of coal, and was dated in or about May, 1877. Three others followed shortly afterwards. In June of that year the plaintiffs entered into an arrangement with defendants White and Bingle, under which the latter were to advance a sum of money for sinking a shaft, in consideration of their being admitted to joint proprietorship in the leases and intended colliery. An attempt was then made—as I gather somewhat uncertainly—to sell the mine or float a company for it, at a large price; but this attempt not proving successful, a new arrangement was substituted in November of the same year, for opening

and working a colliery themselves upon the lands then under lease, and in others which they might afterwards acquire on joint account. The terms of agreement were thereupon embodied in the following memorandum:—"In consideration of Bingle, White and Co. agreeing to advance the amount necessary to open up the mine—say, not exceeding in the aggregate 14,000*l.* in such sums as may be required—the following conditions are agreed to by Henry Harper and Thomas Bevan, viz.:—The entire interest in the leasehold property to be divided into 50 equal shares, and apportioned thus: Henry Harper, 12½ shares; Thomas Bevan, 12½ shares; J. R. Bingle, 12½ shares; E. A. White, 12½ shares. The amount advanced to bear interest at the rate of 10 per cent. per annum until the full amount of loan is recouped; interest to be payable half-yearly on balance from time to time found due, as may be required by Bingle, White and Co.; fifty per cent. of the profits and earnings to be put on one side half-yearly to pay off the advance until the whole is refunded. The property to be liable for the same until debt is discharged. After the advance has been paid off as before determined, Henry Harper and Thomas Bevan agree to pay to J. R. Bingle and E. A. White the sum of 1000*l.* each for services rendered in procuring the required capital above-mentioned; such payment to be borne by H. Harper and T. Bevan individually, irrespective of the joint interests of the company." In accordance with this latter agreement, White and Bingle advanced the necessary capital from time to time to the extent, as I gather, of 14,000*l.*, for opening and working the Ferndale colliery, and providing all requisite machinery and plant; and the colliery was managed by the plaintiffs, whilst the commercial and financial business and the accounts were conducted and kept by White and Bingle. The former raised and delivered coal, and the latter sold it and received the proceeds, and paid all rents or royalties, working expenses, and other outlays, and retained the surplus for appropriation under the agreement. The colliery was worked at a handsome profit; and in 1879 it was offered for sale by White and Bingle, with the plaintiffs' concurrence, at 60,000*l.*, but no sale was effected. At the end of each of the four half-years expiring on 30th June and

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1884. 31st December of 1878 and 1879, White and Bingle made up
HARPER and rendered to the plaintiffs accounts and dividend memoranda,
v. in all of which accounts and memoranda net profits were
BROWN. shewn. The aggregate net profits amounted to 9560*l.*; those
Manning P.J. of the half-year ending 31st December, 1879, being as much as
3165*l.* The accounts had been debited with interest at 10 per
cent. per annum on White and Bingle's advances, as per agree-
ment; and 50 per cent. of the net profits were reserved by them,
in like accordance with the agreement, towards paying off the
principal moneys. The reserves or retentions thus made up to
and on 31st December, 1879, amounted to 4780*l.*; and a like
amount was divided between the proprietors, that is to say, by
payments to the plaintiffs and retention by White and Bingle.
After that date, the colliery continued to be worked, and its
business to be conducted in the same way until the 12th April
following, on which day it was placed in the hands of the
defendant Brown under the trust deed already mentioned.
During this interval net profits continued to be made, but as
these were not distributed, the entire amount (about either
1300*l.* or 1700*l.*) remained with White and Bingle, and should
go against their advances. As to the sources of White and
Bingle's advances, the plaintiffs were not apprised; but it was
shown at the hearing that White at first, and afterwards White,
Bingle and Co., obtained bank credits guaranteed by defendant
Brown in the names of "J. and A. Brown," and that they also
had an overdrawn open account in the books of that firm as kept
by him. It also appeared that they borrowed in 1878 the sum
of 11,000*l.* from Mr. G. H. Cox, out of which they paid part of
their then existing bank debt, and gave him a mortgage on their
sixty-five acres of land, leased to the plaintiffs, and on their
royalties payable under it, and on some other property of their
own; but this, of course, did not affect the lease or colliery
concern. The plaintiffs seem to have learned that the money
raised by this mortgage was partly applied towards the discharge
of White and Bingle's previous bank debt, and that this debt
had been occasioned by their advances for the colliery; but they
had no concern, personally, with either of these matters, nor
was the credit of the partnership in any way pledged for them.

After this mortgage, White and Bingle again obtained a bank credit under a guarantee given by defendant Brown, in the names of "J. and A. Brown," as before; and they continued to have an open overdraft account with J. and A. Brown, through defendant Brown. The former stood at 6605*l.*, and the latter at between 2600*l.* and 2700*l.* at the date of the trust deed; but the plaintiffs were not, nor was the partnership, in any way involved in these indebtednesses. The overdrafts were perhaps indirectly founded upon an authority given by Mr. James Brown to defendant Brown to let Mr. Bingle have from 3000*l.* to 4000*l.* on going into the Ferndale colliery concern; but I do not find that any authority had been given for the guarantees signed for the bank credits. It did not appear that defendant Brown, or "J. and A. Brown," had any security from White and Bingle for their overdraft, or for the guarantee existing in April, 1880, nor what the relations were between them in other respects. It was not attempted to be shown that even White and Bingle's interest in the colliery, and in the contingent return of their advances under the agreement of 1877 had been in any way pledged, as they might reasonably enough have been, provided that the plaintiffs and the colliery and partnership business were not disturbed. The plaintiffs' names now here appeared in the books of J. and A. Brown, or of defendant Brown, as debtors or otherwise. It was, however, urged before me that White and Bingle's advances under the agreement of November, 1877, created an indebtedness on the part of the plaintiffs, and that they were a charge on the partnership property, so as in some way to give rise to an indirect responsibility on their part for White and Bingle's borrowings, and, consequently, for the alleged debts, in virtue of which, as will be seen, defendant Brown took upon himself to make the sale now questioned. But I hold, as a matter of clear law and fact, that the money introduced by White and Bingle created no debt or responsibility on the plaintiffs' part to any person whomsoever; and that although the agreement charged the advances on the joint property in a certain sense, such charge was only for payment of interest and for the gradual restoration of principal out of net profits if and when they should be produced, the latter at the rate

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1884. of 50 per cent., until the whole principal money should be restored.

HARPER The advances were the price paid under agreement by White
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BROWN. and Bingle for receiving equal shares in the plaintiffs' leases
Manning P.J. and seams of coal, and were made half to themselves as equal participants in the benefit of the outlays for machinery, &c.; with the advantage of a conditional return to themselves individually of the whole with interest, out of anticipated profits, and of an ultimate bonus from each of the plaintiffs individually, after such return should have been completed in that way. Meanwhile, half of the lands, mine, and seams of coal, and of the machinery and plant procured by the advances belonged to the plaintiffs, free from personal indebtedness, and the other half belonged to White and Bingle; and the latter could no more claim to be creditors of the plaintiffs in respect of their advances, than the plaintiffs could claim other payment for the half of their lands and seams of coal which they had given to White and Bingle. As to the amount at which White and Bingle's advances stood, I was left in great difficulty by the extreme vagueness of the evidence put before me by those who alone could have made the matter clear; and this difficulty remained with little abatement, notwithstanding that White and Bingle's books were afterwards produced on my demand, and were examined and made the subject of attempted explanations by accountants on both sides. No one could point to any distinct entries in the books from which they could inform me of the amount. Some half-yearly statements of "capital" were confidently relied on by defendants as showing a larger amount than I now conclude to be correct; but this evidence did not satisfy me, inasmuch as "capital" might include additions out of working returns, or might represent the value of the plant, &c., without regard to the reserves out of net profits. In consequence of the vagueness of the oral proofs, I have personally studied the books and the dividend memoranda, and have arrived at the conclusion that the advances stood at 10,536*l.* on 31st December, 1879, together with certain outstanding liabilities of White and Bingle's for land purchases, which were, however, approximately covered by the profits retained by them between 31st December and 12th April, 1879-80. I arrived at the sum

of 10,536*l.* by calculating the principal sums represented by debits and credits for interest on the advances and past reserves in the dividend memorandum of 31st December, 1879; after which I deducted from the debtor balance the addition of 1582*l.* 10*s.* made to the reserve fund on that date out of the preceding half-year's net profits; and I added 971*l.*, which appeared to have been freshly advanced during that half-year. Broadly, I will take the amount to have been 11,000*l.* at the date of the deed of trust, as this agrees with the deed itself, in which Mr. Cox's mortgage debt for that sum is put in the place of White and Bingle's advances in respect of the reserves of 50 per cent. to be made out of profits before the distribution of dividends under the trust. Such being the state of things so far, the trust deed came to be executed under the following special circumstances. In the early part of 1880, the plaintiffs and their partners, White and Bingle, appear to have had some disagreement, the nature of which was not disclosed; and, concurrently, the defendant White was engaged by defendant Brown to proceed to England to take some management there of J. and A. Brown's affairs, and was about to depart, whereupon defendant Bingle expressed himself unwilling to go on with the colliery in the absence of White, and defendant Brown declared himself indisposed to go on with the advances to White and Bingle. It was said also that the seam of coal then being worked was failing, and that fresh seams would have to be searched for. Also, at the end of 1879, a combination known as the "Vend" had been broken up, which had existed for some years amongst the colliery proprietors for maintaining a high price for coal, and its revival (since brought about) was uncertain. The disruption of the "vend" affected the Ferndale colliery less than others, as the proprietors held a contract with the Government Railway Department at a high price up to the end of 1880, by which time the "vend" might possibly be revived; but nevertheless the probability of a great fall in the general price, which was already beginning to follow the disruption, undoubtedly affected its prospects more or less. These various circumstances led the plaintiffs and White and Bingle to meet in March and April, 1880, at the office of the latter, to discuss

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matters and consider their course, at parts of which meetings the defendant Brown was present. At one time it was proposed that he should represent defendant White in the colliery business ; but at the last of these meetings it was arranged that the colliery and its business should be placed in his hands in trust for all parties. Evidence of the verbal arrangements was given on behalf of the defendants by defendants Bingle and Brown, and that of defendant Brown was accepted by the plaintiffs' counsel without calling the plaintiffs to give their versions. I also adopt the account given by him ; and as the executed deed is not wholly in accordance with it, and the action of defendant Brown under the trust was greatly at variance with what I thence gather to have been the true understanding of the parties, I think it important to extract from my notes the material parts of his evidence on this subject. In examination-in-chief, after stating that the circumstances already mentioned were discussed, and that he had intimated that his firm (as he called it) would not continue its advances, his evidence was as follows :—He said : “ When I returned (after a request to withdraw for a time) they asked me if I would take the property—whether I would take the property to do the best I could with it. The prospects of the coal trade were discussed, and the price of coal, and the value of the property as a colliery ; and it was decided that as the area of the coal appeared to be limited, Harper should bore to see if he could find further seams with coal in the property. Harper was selected as a mining engineer, and Bevan agreed, if I would take the property, to become contractor to cut the coal and deliver it. He was to give me a tender for the delivery of the coal. The contract was to include putting the coals into the waggons. Nothing was said about a sliding scale, but that is a usual thing, depending upon the price of coals. I had to provide a boiler at about 300*l*. I was to get it as I best could. It was not got. Bevan asked me for it once or twice. . . . It was arranged to continue the work, but that I should not be bound to carry on the property in any shape or form. I would not take it on any other terms. I was not to be bothered with it. I might throw it up altogether the next day. I so stated at the time ; I might give it up at any moment ; it was a favour that I took it.”

In cross-examination for the plaintiffs, he said: "On my return they asked if I would take the property and do the best I could for them. I told them that, on the distinct understanding that I would not bind myself to carry on for any time, I would do the best I could for them. There was a paper signed at that meeting in which terms were set down. It was given to Mr. Capper (this defendant's solicitor) to prepare the trust on. I was to carry on the property, and do the best I could for these people; and I was to get the boiler for the colliery, and contract with Bevan, and give Harper work to do in boring to see if he could find a fresh seam of coal. Nothing was said about how I was going to carry on for the benefit of these people. I don't recollect anything in particular." On re-examination by his own counsel, he said further: "I say the deed was drawn up in accordance with the paper (which he was thereupon required to Produce). At the meeting I was to have power to sell in case I should not carry on. I can't say whether that was mentioned (in the paper?). I had no doubt as to my power to deal with it as in the deed, but I can't recollect exactly that it passed." Upon this evidence, I was not satisfied that the plaintiffs had been led to understand that Brown was to have such power of sale as he claimed, or that they were to be affected by any indebtedness on the part of White and Bingle; and, therefore, at a later stage of the case I demanded that this paper, or a copy, if any were in existence, should be produced for my own information; and I adjourned the case partly for that purpose. But no such production was made, it being alleged by defendant Brown that Mr. Capper, to whom the paper had been given, had died, and that, notwithstanding diligent search, it could not be found, and that no copy had been kept. Defendant Brown then said that the paper had been prepared amongst the other parties, and that he did not know the contents, and that he did not know one way or the other whether there was anything about money in the memo. Harper being then recalled, swore that no memo. had been signed at the meeting, nor at any time; and thereupon Brown, being again questioned by me, said: "I got a memo. I don't know by whom it was signed, or whether it was signed at all. I heard it was." I believe Harper; but yet do not doubt

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HARPER seen this alleged memo., because if it had been prepared and
v. signed at the meeting by mutual consent, it would probably have
BROWN. expressed the intention of the parties in language which the
Manning P.J. plaintiffs would have understood better than that of the deed of
trust or the draft which they signed; and if it were not a memo.
to which the plaintiffs were parties, the source from which it
came could probably have been ascertained. In its absence,
however, and from all the circumstances, I infer that the prepara-
tion of the deed was left in defendant Brown's hands, in full
confidence, and that a memorandum of terms was prepared by
one or more of the parties other than the plaintiffs, and delivered
to Brown's solicitor by way of instructions for the deed; and
I am satisfied by defendant Brown's examination, and by the
general tenor of the plaintiffs' evidence and subsequent con-
sistent conduct, that the understanding conveyed to their minds
was to the effect that a distinct fiduciary character should be
conferred on and accepted by Brown, and that he should, so long
as he retained the trust, act for their benefit and advantage in
carrying on the mine and colliery business, subject to a free
right on his part to withdraw from and surrender the trust
whenever he should think fit, and subject, of course, to an
implied right to be recouped any outlays, advances, or losses he
might make under the trust. They must, of course, also have
understood at the same time that the property would remain
subject to the special charge created by the agreement of
November, 1877, in respect of the working capital put in by
White and Bingle; but I am satisfied that they were not led to
understand that their interest in the colliery, &c., would be
placed in defendant Brown's hands and in his power for sale at
his pleasure in payment of the debts of White and Bingle. I
am further satisfied that defendant Brown undertook the trust in
his individual capacity, in which character not a shilling was then
due to him by any of the parties, or in any way. He did not
take the trust on behalf of J. and A. Brown, and it was even
shown that James Brown, the single member of that firm, and
only actual creditor of White and Bingle, was not only not
consulted as to the arrangement and deed, or as to the sale, but

was wholly ignorant of them until recently. The preparation of the deed having been placed in Mr. Capper's hands, that gentleman prepared a draft, which the plaintiffs at first refused to sign, on some ground which did not appear, but which they subsequently signed, apparently with amendments, after being advised to do so by their solicitor, Mr. R. W. Thompson, of Maitland. In this draft I find alterations and interlineations which are not initialled, but in accordance with which the deed was engrossed and subsequently executed. The engrossment was executed without any further reference to the plaintiffs' solicitors. The deed was made between the defendant Brown, describing him simply as "colliery proprietor," of the one part, and Harper, Bevan, White, and Bingle, as the "Ferndale Colliery Company," and was signed by defendant Brown thus, "A. Brown, as trustee," and by the other parties in their individual names. Mr. James Brown is not, nor is his firm, a party to the deed, nor is any reference made to either throughout its provisions. For the better understanding of the paramount spirit and intention of the deed as a trust for the benefit of the conveying parties, rather than as a security by means of which defendant Brown might pay himself the amounts due by some of them; and in order to show the impression it was calculated to convey and did convey to the plaintiffs, of the effect of execution by them, I think it desirable to state the contents with considerable fulness. After reciting that Harper, Bevan, White, and Bingle had been engaged for some time as a company, and had opened and worked the Ferndale Colliery, and were as co-partners jointly interested in the mines and seams of coal in the lands mentioned in certain leases and documents mentioned in a schedule, and in the colliery plant, &c., and reciting White and Bingle's mortgage to Cox, there was the following recital—somewhat altered from the draft, the truth of which, so far as it included the plaintiffs, was denied by them, and was put in issue by the pleadings:—"And whereas there is now due and owing to the said A. Brown by the said H. Harper, T. Bevan, E. A. White, and J. R. Bingle, a certain sum, and the said A. Brown has agreed to advance and pay for them, and on their account, a further sum for certain machinery required at the

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said mine, if necessary, making in the whole the sum of 3000*l*." Then followed the recital of an agreement that for the purpose of securing the payment to the said A. Brown "of the money so due and owing to him, and to be advanced as aforesaid," and "also for the purpose of working the said mine," Harper, Bevan, White, and Bingle should assign all the said leases, &c., and the colliery, &c., for the purpose of enabling said A. Brown to act for and on their behalf in the management and disposal of the said property and colliery, &c., as thereafter mentioned; and then, after a recital that assignments, &c., had been executed accordingly, it was declared that Brown held the said lands, &c., "in trust, to continue and carry on the business of working, getting, raising, carrying away, selling, and disposing of the said mines of coal, and to do all things necessary and expedient for getting the said coal to the greatest advantage and benefit to all concerned, with full power to manage the same in all respects in his discretion, without interference or control by any persons interested in the profits of the business as thereafter mentioned;" and "for the purposes aforesaid" to hire and employ persons at salaries or wages, and to make contracts, &c., and to sell the coal raised as aforesaid, and to adjust and settle all accounts, &c., &c., "and generally to transact all matters and concerns respecting the said business, and to do all acts and things relative thereto as if he were solely and absolutely entitled to or interested in the said premises." It was then declared that all losses by bad debts, the shipment of coal or otherwise, and the expenses, &c., of and incident to carrying on the business should be defrayed out of the profits, and if that should prove insufficient, then by a sale of the said premises, as thereafter directed, and that Brown should not in any way be liable for such losses, expenses, &c. It was next declared that all usual and necessary books of account should be kept by A. Brown, in which books should be kept a just, true, complete, and particular account of all sums of money paid and received, and of all debts contracted and sales and purchases made, and of all other matters and things conducive to and proper for manifesting the true state and condition of the business; and that on the 1st of July and 1st of January in each year a full and particular

account and rest should be taken and made of all such business as should have been transacted, and of the land and colliery plant, &c., and of all such other things as are usually in a half-yearly account of a like nature; and that a just valuation and a proper balance-sheet should be made out showing the profits or losses of the previous six months; and that such books and balance should be open for the inspection of the said Harper, Bevan, White, and Bingle for seven days after the same should have been made; and that after payment of the hewing contract, traction rates, royalties, interest and taxes, losses and costs, &c., the profits shown in the balance-sheet should, after deducting one-half thereof to be placed or kept as a reserve fund towards paying off the liability to the said G. H. Cox, be equally divided between the said four persons. The deed then provides that Brown should not be compellable to carry on or work the colliery or business, whether or not the same should yield a profit above the working expenses and interest on the amounts due to G. H. Cox or said Brown. Then follow the provisions under which the defendant Brown claims to have lawfully sold the property, and which are as follows:—"In the event of the said Harper, Bevan, White, and Bingle, or one of them, not paying him (*sic*) the amount shown by the books of account to be due to him for principal and interest, and also all sums the said A. Brown may have advanced for working expenses or any other account whatsoever, he, the said A. Brown, may exercise the power of sale hereinafter contained, after giving twenty-one days' notice in writing to pay off the amount so due to him as aforesaid. Provided also that at any time hereafter, in the event of it being ascertained that the said colliery and business is being worked at a loss not sufficient to pay interest on the capital and the rents or royalties reserved by the said leases, the said A. Brown shall, after giving the said Harper, Bevan, White, and Bingle 21 days' notice in writing to elect what they will do with respect to the sale of the said premises and business, and if they fail to agree as to the manner of the sale of the said property before the expiration of the said notice, the said Brown may at such time or times as he shall think proper sell and absolutely dispose of the said lands, colliery, plant, &c., or any part or parts thereof,

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HARPER or in lots, subject to such conditions and in such manner as he
v. (Brown) shall think fit." Then, after some usual provisions
BROWN. incidental to a sale, there is a proviso (under which the purchasing
Manning P.J. defendants claim to be irresponsible) that the receipts of A. Brown
for moneys to arise by such sale shall, *inter alia*, discharge the
person paying the same from being obliged to inquire or take
notice whether the power of sale ought not to have been exercised,
or from being affected by any irregularity or impropriety in the
exercise thereof. It was then declared that A. Brown should
hold the proceeds of sales which should not be required to satisfy
G. H. Cox's mortgage upon trust to retain expenses of sale, and
all other costs or charges incurred by or payable to him in
relation to or in respect of carrying on the said colliery and
business, and then to apply such moneys in or towards satisfaction
of the money which should then remain owing to himself, on any
account whatsoever, and to pay the surplus (if any) to or accord-
ing to the direction of the said Harper, Bevan, White, and
Bingle. Then there is a proviso that Brown should not be
compellable to sell, and that, in the event of the colliery being
worked at a loss, he should have the option of carrying on for
two years, on paying the interest due on the capital, and the
rents and royalties, and that whatsoever sums he might advance
for that purpose should be a charge on the premises, and for
which the other parties should be jointly and severally liable;
and that he might at any time mortgage all the said premises
for the purpose of raising money, either to carry on the colliery
and business, or to repay himself for the amount due to him as
aforesaid, and the interest thereon, or for money which might be
advanced by or be due and owing to him on any account what-
ever. Lastly, it was provided that Harper, &c., might at any
time pay A. Brown all moneys due and owing to him, and that
Brown should thereupon convey and assign the whole of the said
premises as they should direct. Under this arrangement and
deed defendant Brown claimed before me, in the course of his
cross-examination, to have had the right to sell the properties on
the next day if he had chosen. Concurrently with the execution
of this deed Brown entered into a written contract with plaintiff

Bevan for hewing and delivering coal from the mine at so much per ton, subject to a short notice for determining the contract, which notice was not, however, intended to indicate the probability of early cancellation, but to admit of a sliding scale proportionate to the varying market price of coal, and which was acted upon accordingly. Bevan, under this contract, caused coals to be hewed and delivered, and Brown received and sold them, and paid for the hewing and all other outlays; but he did not, although asked for it by Bevan more than once, provide the promised steam boiler. It was stated by Brown that Harper searched for a new seam and failed; but his statement was very general, and as there scarcely was time for the necessary sinking, and as I have not noticed any charge in defendant's account for Harper's services, I place no reliance on this allegation as an item in justification of Brown's sale. Brown opened and kept books purporting to be certain proper accounts of receipts and disbursements up to and for a short time after the following 11th August, on which date, as will presently appear, he gave the notice under which he afterwards sold the property. Meanwhile the plaintiffs had, on or about the 18th or 20th July, applied to him for the accounts of the business for the half-year ended on 30th June, and were told by him that he and his accountant had been too busy to go into the accounts, but would do so next week. The defendant said he had no recollection of this, and the accountant said that he had made out the accounts early in July, and that he made four copies, which he believed he had handed to Brown. But on cross-examination of the accountant, and on his memory being refreshed by looking at some book then placed before him, he stated that the accounts must have been made out between the 5th and 11th August. In fact, no copy of such account had been delivered to either plaintiff up to the said 11th August, nor had they been shown any such account. On that day, the following notice was, without any previous intimation of what Brown contemplated, served upon each of the plaintiffs:—"Newcastle, 10th August, 1880. To Messieurs H. Harper, T. Bevan, E. A. White, and J. R. Bingle,—I hereby give you notice that there is now due and owing to me, Alexander Brown, of Newcastle, merchant, the sum of ten thousand nine hundred

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1884. and ninety-five pounds ten shillings and fourpence (10,995l. 10s. 4d.), as shown by the account annexed hereto, and I now demand payment of the said amount within 21 days from the service of this notice upon you, or any one or more of you; and I have to inform you that unless the amount so due and owing to me be paid and satisfied within the time mentioned, I shall exercise (without any further notice) any power given by you, or any one, two, or three of you, to me by deed or otherwise, for the purpose of compelling payment thereof; and further, that I will take any other proceedings that may be considered necessary to obtain payment of what is now due to me, unless my claim is satisfied as above-mentioned. ALEXANDER BROWN, by Walter N. Capper, his attorney." The account annexed was as follows:—

"Messrs. Harper, Bevan, Bingle, and White, Dr. to Alexander Brown. 1880.—June 30. To amount due as stated in declaration of trust, 3000l.; debit balance to date, 995l. 10s. 4d.; overdraft Union Bank, 7000l.: 10,995l. 10s. 4d. Newcastle, 10th August, 1880." Defendant Brown also caused to be delivered a somewhat detailed account of the mining operations, so far as they are therein set down, from 12th April to 30th June, as prepared by his accountant under his personal directions, by which those operations were made to show the alleged deficiency of 995l. 10s. 4d. for that period. No account for the half-year from 1st January to the 30th June was at any time made out. On the following day plaintiff Harper handed the notice to Mr. R. W. Thompson, with instructions; whereupon Mr. Thompson addressed a letter to Mr. Capper, dated August 12th, in which he writes thus:—"Mr. Harper has handed me a document purporting to be a demand for the sum of 10,995l. 10s. 4d., with an account annexed, purporting to show how that amount is made up. My clients, Messieurs Harper and Bevan, are utterly surprised at the contents of the demand and account, as they are utterly in the dark as to how the account is made up; and personally they do not owe Mr. Brown a penny on account of the Ferndale colliery, nor had their partners any right to pledge their credit or the credit of the firm in such a way as the account would appear to shew has been done. I must, therefore, ask you to inform my clients through me as to the manner in

which they, as members of the firm of the Ferndale Colliery Company, or in any other manner, are alleged to have become indebted to Mr. Brown, and then in what particular way each of the three large items of the account is made up. . . . At the time of the execution of the deed prepared by you and perused by me, and subsequently executed by my clients, no mention was made to them or to me, as in reason and fairness might have been done, that these sums, or any of them, or any part of them, were due by my clients either as partners in the Ferndale colliery or otherwise; and it is not surprising that they should feel amazed at such a demand for such a sum, as they know it has not either been advanced for them or expended on the colliery works or in wages or otherwise since the deed was executed." In reply, Mr. Capper wrote on the 16th (obviously after taking his client's instructions), stating that "the item of 7000*l.* was the amount due Mr. A. Brown for moneys advanced to Messieurs White and Bingle for and on behalf of the proprietors of the Ferndale colliery, and which amount was used in and for the purposes of the said company; that Mr. Brown claimed the item of 3000*l.* as the amount due to him, as shown under and by the declaration of trust; and that the item of 995*l.* 10*s.* 4*d.* showed the loss made in working the colliery from the 12th April to 30th June." He added that the books were open for inspection at the offices of J. and A. Brown by either of the parties interested in the matter. After this one of the plaintiffs, who alone of the two could read, requested of defendant Brown permission to see the books, and at another time asked permission to take an accountant with him to examine them; and he alleged that Brown refused compliance. Such refusals were denied by Brown; but I am inclined to believe the plaintiffs, for the reason, more particularly, that (as afterwards appeared) the books would have been found at that time not to bear inspection, especially in respect of the statement of a loss in the working of the colliery. It is not, however, necessary to come to a definite finding on this matter. After this the plaintiffs, appearing to regard the threatened sale as being applicable to White and Bingle's interest in the joint property, and to their

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separate property under mortgage to G. H. Cox, and to their alleged debts to Brown, or not knowing how otherwise to escape from the entanglements in which they found themselves, endeavoured to find persons of capital who would buy from defendant Brown, and thereupon become joint owners with themselves. This I consider to have been the tenor of their negotiations, although there was some confusion of evidence upon the subject, and some question between the negotiating parties as to the proportion of interest which the plaintiffs should receive. For this purpose Brown wrote to Bevan, offering to sell to him first for 22,000*l.*, including Cox's mortgage, and afterwards for 9000*l.*, subject to that mortgage; and the negotiations were based upon those offers. I gather that on all hands the 11,000*l.* due to Cox was regarded as the equivalent of the advances of White and Bingle under the agreement of November, 1877, and that the plaintiffs were seeking capitalists who would give 9000*l.* to secure White and Bingle's equal share in the colliery property, they themselves retaining their half, and all participating equally in Cox's mortgage debt and mortgaged property. They represented, and I think believed, that the property was worth 60,000*l.*, and submitted calculations which, though exaggerated, were, as far as could be seen, made under a *bonâ fide* belief in the great value of the property. These negotiations were first with defendant Sweetland, and were formerly initiated by a letter, drawn up by Sweetland himself, as follows:—"Newcastle, September 17, 1880. Mr. Charles Sweetland, Newcastle. Dear Sir,—I hand you, herewith for perusal, a letter signed by Mr. Alexander Brown, offering me the Ferndale colliery, with plant, &c., upon certain conditions. Mr. Harper is connected with me in this matter on equal terms. Our object is to make such arrangements as will enable us to close with Mr. Brown, after adjusting accounts with him; and in consideration of your assisting us, and the matter being brought to a successful termination, we agree that whatever subsequent arrangements are made for carrying on the colliery you shall stand in on equal terms with us, and have one-third of any portion of interest in the whole that we may be able to retain. This offer to remain open for ten days. (Signed)

THOMAS [his X mark] BEVAN. Witness—H. Harper. I agree to the above offer being made.—HENRY HARPER.” After this date, defendant Sweetland introduced defendant Stokes into the negotiations. To both these gentlemen, the plaintiffs showed the notice of 10th August, and stated that they did not owe one penny of the claims; and also, as they deposed, and as I believe, gave them the whole history of the case. A copy of the deed was, on the requirement of Sweetland and Stokes, placed in their hands and examined by them; and in the course of the negotiations Sweetland sketched for the plaintiffs a protest which he advised them to send to defendant Brown; in consequence of which plaintiff Harper addressed and posted to him a letter, which Brown denied having received, but which I assumed to have reached its destination; and upon its non-production on notice, I allowed Harper, without objection, to state the contents from memory. He stated them to have been to this effect: “In reference to a letter received for Mr. Bevan from you in respect to the sale of the Ferndale colliery, I beg to protest (or I hereby protest) against your right to sell my interest, or any portion of my interest, in the colliery.” Probably its terms included Bevan’s interest, as Harper and Bevan were acting together throughout, but Harper was not asked whether it was so. The negotiations with Sweetland and Stokes extended from the latter part of September up to a day not earlier than the 10th October, when they were closed by Sweetland’s informing the plaintiffs that Stokes, who had gone to Sydney for the purpose, had “ceased to work to get the money.” On the 18th of the same month those same defendants joined in the purchase from Brown, who on that day sold the whole property to Law, Fletcher, Stokes, and Sweetland; and on the 19th a contract of the sale was signed. Shortly afterwards Brown forcibly turned out Bevan and put Stokes into possession. At the time of defendant Stokes being put into possession, and up to the commencement of this suit, the plaintiffs appear only to have known Stokes as the purchaser; and accordingly they treated him as sole purchaser in their statement of claim, and had subsequently to add the other three purchasers as defendants on learning from defendants Brown and Stokes’ statements of defence that

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1884. they were in the purchase. It now appears that the sale was
HARPER effected in this way. First, Brown spoke with his relative,
BROWN. Henry Law, as to his purchasing ; but the time or particulars of
Manning P.J. this negotiation did not appear, that defendant being out of the
colony and not a witness. Then on 14th or 15th Brown informed
Fletcher that Law was inclined to purchase if he, Fletcher,
would be one of the purchasers. Upon this Fletcher, after some
bargaining as to the price and agreeing on 20,000*l.* (including
the mortgage), said he would not go into the purchase unless
Stokes or a Mr. Wallace joined. On the 17th or 18th defendant
Brown spoke to Stokes informing him that "he had sold,
or had partially and conditionally sold to Fletcher and Law,"
and that they were anxious to know if he, Stokes, would take a
third. To this Stokes, after saying that the matter required
consideration, as he knew nothing about the mine, said he had
been in communication with Sweetland and could not take a
share without offering him an interest. Whereupon Brown
agreed to inquire of Law and Fletcher whether they would
take Sweetland in with them ; and on their assenting, Stokes
was so informed, and he arranged with Sweetland to divide
a third share with him. All four met on the 19th at Mr.
Brown's office, and the sale was concluded, and a contract
made and signed by Brown and the four purchasing defendants,
by which Brown sold to them the whole of the property for
9000*l.*, subject to Cox's mortgage for 11,000*l.* According to
the signed instrument, the sale was to all the four indiscrimi-
nately. There had been no advertisement or public notification
of the intended sale, nor was any agent employed to look for
purchasers ; but the whole business was managed by defendant
Brown personally and privately. The broad result of this sale
is that the plaintiffs have been wholly deprived of their property,
and that 9000*l.* was placed in the hands of the defendant Brown
for debts and liabilities of which no part was theirs. The plain-
tiffs after the sale employed Dawson and Sons, solicitors, of
Sydney, to take the matter in hand, and a correspondence ensued,
in which the sale was repudiated on the plaintiffs' behalf, and
accounts were demanded and proceedings threatened ; but the
suit was not commenced until March, 1882. In the meantime

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Brown had gone to England. From that and other causes the proceedings have been greatly delayed, but not, in my opinion, so as to affect the plaintiffs with any such *laches* as can be permitted to prejudice their equities. During the time which has elapsed since the sale and delivery, the new owners have worked the concern profitably, and a good new seam of coal has been discovered. No dividends have, however, been taken, as the profits have been used in enlargement of capital. I now return to Brown's notice of August 10th, and the grounds it sets forth for the hostile action which he then contemplated and has subsequently pursued. That notice is not in accordance with either of the clauses in the deed of trust, on which alone any sale could be made. It did not expressly indicate an intention to sell, within the clause authorising a sale for non-payment of money due to him, but announced that he should, in default of payment of the claims then made, "exercise any power given by the four plaintiffs, or any one, two, or three of them, by any deed or otherwise, for the purpose of compelling payment thereof; and further, that he would take any other proceedings that might be considered necessary to obtain payment of what was due to him."

What was meant by the terms of this notice was in no way explained; but it is suggestive of the existence of some other security from some of the parties, apart from the others. The notice also fails to follow the provision as to sale in the event of its being ascertained that the business was being worked at a loss, as it does not set forth any such ascertainment, and does not give the partners notice to elect what they would do in respect of the sale. Under the first of these provisions, the notice might nevertheless be held sufficient after the negotiations of the plaintiffs, based on Brown's proposal to sell to Bevan; but under the second I think the notice and sale made by the defendant Brown independently, but under colour of this provision, wholly insufficient and bad. And now, passing on from the terms of the notice to the actual grounds on which it is sought to justify the sale, I will consider the sale first as if made under the last-named provision. As such, I think the sale unwarranted, for the following reasons:—1st. That it cannot be said to have been ascertained within the true meaning of

1884. the provision that the colliery was working at a loss, for this
HARPER would imply something more than the trustee's unexamined
v. statement. 2nd. That the 10 or 11 weeks during which Brown
BROWN. had carried on the concern, did not afford a sufficient test of such
Manning P.J. working at a loss. 3rd. That the evidence does not satisfy me
that there had been a genuine loss in working during that time,
and that for reasons which will more conveniently appear in
dealing with the 995*l.* 10*s.* 4*d.* as an alleged debt due to Brown,
and as justifying a sale under the other power, I wholly discredit
the account purporting to show the loss, and even believe the
contrary to be the truth. 4th. That an account for the half-year
ending on 30th June would undoubtedly have shown a profit.
5th. That if there had been a loss as alleged, Brown's proper
course in reference to it would have been to invite the parties to
consider the state of things and the expediency of carrying on or
winding up, or to have required payment of the deficiency and
have withdrawn from the trust, or else to continue the operations
for a longer time under the alternative provided by the deed.
And lastly, as well as principally, because I consider that the
defendant Brown ignored and completely cast aside his fiduciary
character and his duty to act for the benefit of the plaintiffs;
and that, in so far as he used this alleged loss as a ground for
selling suddenly, he only sought for himself an opportunity for
covering the debts and liabilities which he had permitted White
and Bingle to incur to "J. and A. Brown." The other ground
of sale—namely, the money claims set forth in the notice—will
require more extended attention. In the first place, I apply to
this ground my last stated objection to the sale on that of loss in
working, as it appears to me that the defendant Brown in this,
as in the other matter, completely cast aside the fiduciary cha-
racter upon which the trust was mainly, if not wholly, given, so
far as the plaintiffs were concerned; and has regarded himself
solely in the light of a mortgagee, with a power of immediate
sale as such, and has used his trust as if its sole effect was to give
him an opportunity to sell for his own benefit—and even for the
payment of debts which were not the plaintiffs'. This appears
to me sufficient of itself to invalidate the sale; but if it were not
so, the fiduciary relation and its disregard would at least take

the case out of the decision of the Court in *Campbell v. The Commercial Bank* (1), to the effect that a demand of and sale for more than is due will not invalidate a sale by an ordinary mortgagee. I have next to consider the several items of demand, on their merits, as money claims by defendant Brown, against the plaintiffs. Before dealing with the items severally, I have first to observe that the power of sale for debts appears to me to apply only to debts due to the defendant Alexander Brown, and shown by the books of account; and that I collect from the terms of the powers and the whole tenor of the deed of trust that, notwithstanding some comprehensive words which have found their way into the deed, no debts were contemplated but such as should be due jointly by all the four conveying parties, and as should have reference to the trust, and as such find fitting place in the books of account which the trustee was required to keep. I now pass on to the consideration of the items separately. The largest of these items is that for 7000*l.* claimed as due to the defendant Brown by the four parties. This claim is in respect of White and Bingle's debt to the bank under the guaranteed cash credit, then amounting to 6605*l.* This was neither a debt in which the plaintiffs were joined, nor due to Brown. The item next in amount is the 3000*l.*, set down under the notice as "the amount due as stated in the declaration of trust." This item was not in the books of account at the time of the demand, nor even so recently as March of last year, when they were examined by plaintiffs' accountant; and, as has been already shewn, it was not, nor was any part of it, due, in fact, by the plaintiffs. This claim, therefore, rests exclusively on the force of the recital in the deed that there was due by all the four parties to defendant Brown a certain sum, not fixed by the recital, but shown by oral evidence to mean, probably, the amount of White and Bingle's overdraft; and it was strongly urged by the defendants' counsel that this recital is conclusive as an acknowledgment of the debt, even though proved to be contrary to the fact. I hold it not to be so as between the immediate parties, and under the circumstances which I shall show. These will be particularly stated, because an acknowledgment by recital in a deed is not to be

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(1) 2 N.S.W. L.R. 375.

1884. lightly set aside. It was also urged that if no such debt existed prior to the deed, the recital constituted or was proof of an adoption by the plaintiffs then and there, and by mutual consent of White and Bingle's debt, as a debt due by all the four colliery partners, and I at first inclined to that view. But upon closer consideration, I see that this explanation is inadmissible, as there is not only no trace in the evidence of any such adoption, but it is inconsistent with the case set up by the defendants Brown and Bingle in their sworn statements of defence, and with the tenor of Mr. Capper's letter of 16th August. In these statements defendants Brown and Bingle do not put the claim on the ground of adoption, but distinctly depose that the 3000*l.* was due by the plaintiffs jointly with White and Bingle. In fact, a distinct issue is raised by the pleadings as to the plaintiffs being so jointly indebted, and as to the correctness of the recital as affecting them; and that issue I have found for the plaintiffs. Mr. Capper, also, in writing for defendant Brown, put the item of 7000*l.*, and inferentially the 3000*l.* also, on the basis of advances made by defendant Brown to White and Bingle, "for and on behalf of the proprietors of the Ferndale colliery, and used for the purposes of the colliery." The question, therefore, comes back to the force of the recitals as acknowledging an indebtedness in the amount recited in the face of its being false in fact. Being such, the lowest ground, and the most favourable one to those of the defendants who are concerned in the matter, is that of mutual mistake. There could be no other ground short of fraud, which is not imputed. As regards the defendants, White and Bingle, they were probably content to acknowledge their indebtedness, and to treat defendant Brown individually as their creditor, as it was he who had in fact given them accommodation; but I am satisfied that the plaintiffs did not intentionally allow their names to be added to those of White and Bingle in this acknowledgment; and defendant Brown also was not, according to his own evidence, an intentional party to the recital, or even cognisant of its existence. He was pressed upon the subject; and upon being asked about this 3000*l.*, he replied, "I cannot tell how it arises, but I think it had something to do with the account" (i.e., White

and Bingle's overdraft); and afterwards he said that he "thought it was arranged between the parties themselves," and again that he "did not know one way or the other whether there was anything in the memo. about money." And, again, late in the case, he appears to have been so much at a loss about it that he made inquiries of the plaintiffs' original solicitor during an adjournment, and then deposed that Mr. Thompson "could give him no information about the 3000*l.* in the trust deed." Further, it appears by the correspondence between Mr. Thompson and Mr. Capper, who had then very recently drawn the deed, that the latter could give no explanation of the 3000*l.*, except that it was in the deed. The supposition of mistake, so far as regards the introduction of the plaintiffs, named in the recital, is also helped by the original draft of the deed, and the alterations to which I have elsewhere alluded, which combine to show that it may not improbably have arisen from an accidental and very simple error on the part of the draughtsman. The explanation of this would be too long for insertion here; but I will furnish it to the counsel, if desired. For the reasons given I hold that the claim for 3000*l.* is not established as against the plaintiffs. The only other item of alleged debt to defendant Brown is the 995*l.* 10*s.* 4*d.* put forward as a deficiency in working the colliery, and which I have already dealt with for another purpose. This item, if established, would certainly represent money due to the defendant Brown individually, and by all the four parties. But even if it were so, it would not be of sufficient amount to justify the demand and sale for 10,995*l.* And I also question whether it could be regarded as a debt for the purposes of sale, as it arose out of the trust, and might be quite temporary, and was only fixed as a debt at the time of the notice, by defendant Brown's arbitrary act in choosing to stop short and draw a line at the particular moment. Further, this alleged debt was not, as required by the power of sale, shown by the books of account, inasmuch as it was found that items to the extent of 1453*l.* on the debit side of the deficiency account appended to the notice were not then in the books, and consequently they showed a surplus instead of a deficiency. Nor is this all; for most, if not all, of the items which were introduced to turn the scale had not

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then been paid by defendant Brown, and, therefore, could not constitute debts to him. These items were set down by Brown's accountant under his verbal instructions, as outstanding matters which he would have to meet; but, even as such, more than the alleged amount of deficiency was not established to my satisfaction. One item alone was for 870*l.*, which was set down as due to "the associated collieries," and was explained to be for estimated penalties for excessive outputs of coals under the "vend" arrangements. This was afterwards reduced to 314*l.* 17*s.*, and paid in August, 1882; and, moreover, it did not appear, nor can it be supposed that even this reduced amount arose from excess of output during the 10 or 11 weeks of operations under the trust. The small amount credited for sales precludes this supposition; and if it were the fact defendant Brown must have been in fault for incurring such an amount of penalties during his short management. Indeed, I do not see how any part of the penalties can have belonged to that period, seeing that the "vend" was not then in existence. Therefore, I cannot adopt any part of this item of 870*l.* Various other items were also questioned, amongst which was 100*l.* arbitrarily set down for payment to Mr. Fletcher (since a purchaser from defendant Brown, and now a defendant) for a survey, and 100*l.* for defendant Brown's own office expenses. Further, I am not satisfied as to whether all the coal raised had been sold, and the proceeds credited at the precise moment at which the line is drawn which produced the alleged loss, nor whether the concern had received the full benefit of the railway contract prices; nor whether there were not outstandings, such as debts due to the concern; and against the allegation of a deficiency, there was the evidence of Bevan to the contrary; and, as he was the contractor who raised and delivered the coal, and was paid in proportion to the selling prices, and was also familiar with the charges for royalties, &c., &c., he was well qualified to form a correct opinion. Under these circumstances I must reject this 995*l.* 10*s.* 4*d.* also. This concludes my examination of the facts, and I must now, upon all the grounds which have been stated, declare the sale by defendant Brown to be null and void as between him and the plaintiffs. I have next to consider whether the purchasers, or

any of them, had such notice of the plaintiffs' equities as will invalidate their purchase. In the case of the defendants Sweetland and Stokes, I have no doubt that they were amply affected by notice, and that the sale of the plaintiffs' interest must be set aside so far as their purchase extended. But with respect to Law and Fletcher, the case is different. It is not shown that they had any direct notice of the plaintiffs' equities, and I do not see any sufficient case of constructive notice. The circumstances of their purchase were, indeed, to my mind, very unsatisfactory; and I have seriously considered whether the notice to Sweetland and Stokes did not affect them also as purchasers with them by the same contract. Upon this question I have had, and still have, considerable doubt, especially as the purchasers did not, by the terms of the contract, take separate interests, but bought unitedly. But, as I have not found any authority in point, I do not hold Law and Fletcher to be thus affected with notice; and I therefore allow their shares of the purchase to stand. I have now only to determine the particular mode of relief to be given to the plaintiffs. This is rendered difficult by the circumstances that defendants White and Bingle are consentient to the sale so far as their interests were concerned; and that, as regards the plaintiffs' interests, I do not hold Law and Fletcher to be affected by the wrongfulness of the sale. Therefore, I cannot declare the sale null and void in its entirety, because the plaintiffs' share is alone in question; and I cannot hold it to be so in reference to the entirety even of the latter as against defendants Law and Fletcher, because they are to be taken to have purchased without notice. Nor, for the same reasons, can I direct the concern to be wound up, or the trusts of the deed of trust to be carried out. After much consideration, it seems to me that the only effectual course now open is to declare the sale void, and to set it aside, as between the plaintiffs and the defendants Brown, Sweetland, and Stokes, and to order an account to be taken between them, as if upon a winding-up of the concern, and as if the plaintiffs had continued to be half owners. This will be done by ascertaining the present value of the lands, mine and colliery, and business, including goodwill and the plant, &c., other than new plant introduced by the pur-

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1884. chasers, and the amount of net earnings since the dates of the
 HARPER trust deed; and by directing that the defendant Brown shall be
 v. responsible for and shall pay to the plaintiffs the amounts so
 BROWN. ascertained; and that on defendant Brown so failing to pay the
 Manning P.J. plaintiffs, the defendants Stokes and Sweetland shall be jointly
 and severally responsible for, and shall pay to the plaintiffs the
 amount so ascertained (except in respect of profits prior to the
 sale) in proportion to the interest taken by them under the sale.
 I order and decree accordingly. And I direct that in
 taking the account one-half of the sum of 11,000*l.* which was due
 on the mortgage to G. H. Cox shall be taken to have been the
 amount of charge under the agreement of November, 1877, on
 the plaintiffs' shares in the property of the Ferndale Colliery
 Company at the time of the trust and of the sale. All just
 allowances are to be made. I also order and direct that all the
 costs of this suit up to and inclusive of the hearing, except those
 of the defendants White and Bingle, Stokes and Sweetland, be
 paid by the defendant Brown, and that the excepted defendants
 shall each pay their own costs of suit. But inasmuch as the par-
 ticular frame of decree was not considered in argument by
 counsel, I allow the parties affected by this decree to speak to
 me in Court on the minutes of my decree except as to the costs,
 and for that purpose I direct that this judgment shall not be
 deemed to take effect for the purpose of appeal for 14 days. I
 reserve all further directions and costs.

Against this decision the defendants Stokes and Sweetland,
 and the defendant Brown, appealed on grounds stated below.

1887. The appeals came on for hearing before the Full Court
 (FAUCETT, INNES, and STEPHEN, JJ.) on the 8th of September,
 Sept. 8. 1887.

F. C.

The reasons of appeal by the defendant Alexander Brown
 were as follows:—That under the provisions of the mortgage or
 trust deed of the 12th April, 1880, he had full power to sell the
 Ferndale colliery, being the property comprised in the deed, and
 that the power of sale was duly exercised. That as the deed
 was executed by the plaintiffs with a full knowledge of its
 contents, and after the same had been perused on their behalf

and approved by a separate solicitor, the plaintiffs ought not to have been allowed to enter into evidence to contradict any of the recitals in the deed. That as the plaintiffs entered into negotiations to purchase the colliery from him (defendant Alexander Brown), they were estopped from saying that there was in fact no power to sell. That as the defendants Charles Frederick Stokes, James Fletcher, Henry Law, and Charles Sweetland purchased the colliery as a joint enterprise as partners, it was impossible to set aside the sale as against two of them, and not as against the whole of them. That under the deed he (the defendant Brown) had the rights of a mortgagee, and was not merely a trustee. That as the shares of the plaintiffs in the partnership property were liable to repay one-half of all advances made or obtained by the defendants, Ernest Augustus White and John Raydon Bingle, on behalf of the partnership, such advances were properly reckoned as part of the mortgage debt. That in any case he (the defendant Alexander Brown) ought not to have been made liable to account for the present value of the colliery and the net earning since the date of the sale; and that the plaintiffs had lost any right of complaint by *laches*.

The defendants Stokes and Sweetland advanced the following amongst other reasons for appealing:—That the defendant Alexander Brown, as mortgagee, having made demand upon the plaintiffs and the defendants White and Bingle of what was due to him under the deed of the 12th April, 1880, and none of the plaintiffs and such defendants having made any tender, the defendant Brown was entitled to exercise the power of sale therein; that the defendants having no actual knowledge of any irregularity in the sale, were protected by the receipt clause in the deed; that it was immaterial whether the deed was in form of a trust or mortgage; that there was no jurisdiction to order the defendants to pay to the plaintiffs one-half of the present value of the property.

Owen, Q.C. (Simpson with him), for the defendant Brown.

Owen, Q.C. (Lingen with him), for defendants Stokes and Sweetland.

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G. Knox (Dawson with him) for the plaintiffs.

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By consent the two appeals were heard together.

In the course of the arguments the following authorities were referred to :—*Campbell v. Commercial Bank* (2), *In re Alison* (3), *Warner v. Jacob* (4), *Price v. Price* (5), *Ld. Trimlaston v. Hamill* (6), *Coots on Mortgages* (3rd Ed.) 532, *McLeod v. Jones* (7), *Pearce v. Green* (8), *Lord Hardwicke v. Vernon* (9), *Anon* (10), *Lewin on Trusts*, p. 858.

Dec. 23.

On the 23rd of December, 1887, the judgment of the Court was delivered by FAUCETT, J., as follows :—

FAUCETT, J. This suit, although asking that the defendant Alexander Brown should be compelled to carry out the trusts of a trust deed dated the 12th April, 1880, was in reality brought for the purpose of setting aside a sale by the defendant Brown to the other defendants of the Ferndale colliery, made, or purporting to be made, under a power of sale contained in the said trust deed. The Primary Judge by his decree declared the sale to be void as against the defendant Brown and the defendants Sweetland and Stokes, and ordered as against these defendants in substance and effect that the estate should be wound up, and that the necessary accounts for that purpose should be taken; and his Honour dismissed the suit as against the other defendants. This is an appeal against his Honour's decree. The facts of the case are so fully stated in his Honour's elaborate judgment that it is unnecessary to repeat them. I shall therefore come at once to the consideration of the objections taken to the decree. The main objection—which goes to the root of the decree—is that his Honour was wrong in declaring the sale to be void. In support of this objection, it is contended on the part of Brown, that as trustee under the trust deed of April 12, 1880, he had full powers to sell under the circumstances that arose, and that he exercised

(2) 2 N.S.W. L.R. 375.

(3) 12 Ch. D. 284.

(4) 20 Ch. D. 220.

(5) 15 L.J. Eq. 13.

(6) 1 Ball & B. 377.

(7) 24 Ch. D. 289.

(8) 1 Jac. & W. 105.

(9) 14 Ves. 504.

(10) 4 Mad. 273.

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the power of sale properly. If this objection to the decree be good, the main object of the suit would fail, and nothing would remain but to take the accounts to which it is admitted the plaintiffs would in any event be entitled. It is contended that the deed of April 12, 1880, although for some purposes a trust deed, is also a mortgage deed ; and, accordingly, that the deed being a mortgage deed, even if Brown, in his letter of August 10, 1880, demanded payment of a larger sum than was actually due, such excessive demand could not affect his right to sell unless the mortgagors tendered the amount actually due, or paid into Court the amount sworn to be due. And *Campbell v. The Commercial Bank* was relied on. Some cases also—such as *In re Alison* (11)—were cited for the purpose of showing that a deed does not lose its effect, or any of the rights attaching to it as a mortgage deed, because it is also a trust deed. But the cases referred to were really cases of mere mortgages, although in the form of trust deeds, which was not uncommon in former years. But in *McLeod v. Jones* (12), it was held that the ordinary rule did not apply when the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor, and that the Court could look into all the circumstances ; and the principles stated in this case would, I think, equally apply, if not in a stronger degree, when by the same deed a person became at the same time a mortgagee and also a trustee, not merely in connection with the mortgage, but for other purposes. On this point I agree with the learned Primary Judge. Looking at the circumstances under which the deed was executed, and looking also at the whole purport and tenor of the deed, I think it was substantially and essentially a trust deed. Under it Brown was a trustee to carry on the business of the colliery for all concerned. Under certain circumstances he was authorised to sell, and the conditions on which he was so authorised are expressly stated in the deed ; and whether it is treated as a mortgage deed or a trust deed is, I think, immaterial ; for unless the circumstances mentioned arose, and the conditions stated were complied with, a sale would be prevented if an application were made in time ; or, if a sale were made, such sale would, in

(11) L.R. 12 Ch. Div. 284.

(12) L.R. 24 Ch. Div. 289.

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my opinion, be void as regards the mortgagee, or he would at least be held liable in damages. Now, his Honour seems to me to have found that the circumstances which would justify a sale had not arisen, and, consequently, that the defendant Brown did not sell in accordance with the terms of the trust deed. As to his Honour's finding, this Court of Appeal is placed in some difficulty. It depends to a large extent on the question whether the sum of 10,995*l.* 10*s.* 4*d.*, of which Brown in his letter of the 10th August, 1880, demanded payment as due to him as the results of his management of the colliery from the 12th of April, 1880, the date of the trust deed, to the 30th June, 1880, was in reality due. The sum is made up of three items, viz: 3000*l.* mentioned in the trust deed, 7000*l.* overdraft to the Union Bank, and 995*l.* 10*s.* 4*d.* alleged to be a debit balance. Now, his Honour has himself gone into the accounts—a course which by our *Equity Act* he was entitled to take. He has examined the books kept by Brown, who alone had charge of the books. He has had Brown and his accountant examined before him as to these books, and he has also had two other accountants, one on each side, examined before him. With such means of information and such assistance, and evidently after a very careful examination, he has come to the conclusion that the amount claimed was not due, and has so found as a jury. Under these circumstances I do not see how we can interfere with his Honour's finding on this point, unless we see that he has acted on some wrong principle. We have not the same means that his Honour had of taking the accounts, and to refer it to the Master to examine the accounts, and so to determine whether the Judge had come to a right conclusion, would be to set the Master above the Judge, and to render the work of the Judge nugatory. Viewing the matter in this way, I shall briefly notice the three items of the amount claimed by Brown; and in doing so I agree with his Honour, that Brown can claim only for debts that were due to him under the trust deed, or that have accrued due to him by his management of the colliery under and in connection with the trust deed, and have been ascertained by the accounts. Now, as to the item 7000*l.* being for overdraft with the Union Bank, I cannot see that his Honour has not properly disallowed

this. Whether the amount of the overdraft was due by Bingle and White, as Bingle, White and Co., or due by them to J. and A. Brown, I cannot see that the plaintiffs, Harper and Bevan, were in respect of that overdraft indebted along with Bingle and White, or at all, under the trust deed to Alexander Brown. And as to the item of 995*l.* 10*s.* 4*d.*, which seems to have been claimed as loss in the working of the colliery, that depends so entirely on an examination of the accounts as kept by Brown—which accounts his Honour has himself gone through—that in my opinion it is quite impossible for this Court of Appeal to interfere in respect to it. It seems to me, however, that in respect of this sum, his Honour has only found that it was not shown by the books of account to be due. But as to the item of 3000*l.*, I think the matter is somewhat different, because, with every respect for his Honour, I think we must take the recital in the deed as an admission to some extent. And this opinion his Honour seems to have entertained at first. It may be that the sum intended to be covered was, in fact, due only by Bingle and White; but for whatever reason the plaintiffs consented, along with Bingle and White, as part of the arrangement, to take over this liability. And we must remember that the plaintiffs do not ask that the trust deed should be reformed or amended in this particular, or in any other particular; on the contrary, they ask that the trusts should be carried out. I would think, therefore, we ought to take this recital as an admission that something was due. The recital does not say positively that 3000*l.* was due. It only says that a certain sum was due, and that Brown has agreed to advance a further sum for machinery which together will make 3000*l.* But, as I collect from the evidence, the machinery was never purchased, so that the claim for 3000*l.* was excessive. And what the amount intended to be admitted was is not ascertained, unless we say that it is 3000*l.* less the expected price of the machinery, which is said to be about 300*l.* But his Honour seems to have been unable to get any explanation of this 3000*l.*, and he came to the conclusion that it was not due, and how, after his Honour's inquiry, we are to ascertain what portion of it, if any, was due I do not well see. On this part of the case I am certainly unable to say that his Honour was wrong in holding

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1887. that the defendant Brown, in his letter of the 10th August,
HARPER demanded payment of an amount very largely in excess of what
v. was due, as shown by the books of account. Further, on this
BROWN. point I do not see how we can get over the statement of his
Faucett J. Honour that the alleged debt was not, as required by the power
of sale, shown by the books of account, inasmuch as it was found
by his Honour that items to the extent of 1483*l.* on the debit
side of the deficiency account appended to the notice was not
then in the books, and consequently they showed a surplus
instead of a deficiency. And farther, that most, if not all, of
the items which were introduced to turn the scale, had not been
then paid by defendant Brown, and therefore could not constitute
debts to him—one item his Honour mentions, of 870*l.*, set down
as due to “the associated collieries.” This was afterwards
reduced to 314*l.* 17*s.*, and not paid till August, 1882. It was
argued, however, that as the recital admits that a portion of the
sum of 3000*l.* was due the defendant Brown was entitled to sell
for the amount so due, whatever it was, unless the sum actually
due was tendered. But the ordinary rule, as between mortgagor
and mortgagee, on which this argument rests, is, it seems to me,
here inapplicable, because in an ordinary mortgage the mortgagor
knows, or may be supposed to know, the amount of his indebted-
ness; while in this case the mortgagor or *cestui que trust* can
know his indebtedness only from the books of account, and these
books are kept by the defendant as trustee, and are entirely in his
charge, and were really, as the evidence shows, not made up at
the proper time, and the plaintiffs, as they allege, were not able,
or allowed, to see them. On the ground, therefore, that the
defendant Brown demanded payment of a large amount, not at
all justified, as his Honour has found, by the state of the accounts
as shown by the books, or, at all events, of an amount largely in
excess of what was due, and that he sold on non-payment of such
amount, I cannot see that his Honour was wrong in holding that
the sale was not in accordance with the terms of the trust deed,
and that consequently the defendant Brown was guilty in this
respect of a breach of trust. Further, if the defendant Brown
intended to sell on the ground that the colliery was carried on at
a loss, he should have given notice to the partners to elect as to

the mode of sale. But this he does not seem to have considered. And he seems to have acted on his supposed right to sell on non-payment of an amount which he alleged to be due. Looking at all the circumstances, I agree with his Honour in thinking that, in taking the course he did, the defendant Brown looked solely and entirely to his own interest, and entirely disregarded the interests of those for whom he was trustee. The plaintiffs, no doubt, went very far in their efforts to procure a purchaser according to Brown's offer, and delayed a long time in bringing this suit; still, looking at all the circumstances, I do not think they ought to be considered as having waived or condoned the breach of trust so as to disentitle them to maintain this suit as against the defendant Brown. With respect to Sweetland and Stokes, the case is more difficult. But when it is considered that Brown and Harper at once communicated with Sweetland and informed him that they owed nothing, as the learned Primary Judge has found to be substantially correct, and that Sweetland actually wrote the letter, dated September 17, 1880, in which Brown, acting also for Harper, requested Sweetland's assistance, and that he also wrote the other letter in which it is suggested that a protest should be made against Brown's right to sell, there can hardly be a doubt that Sweetland at all events was made acquainted with the circumstances as far as Brown and Harper themselves knew them; and, although Sweetland says at that time he thought that the trust deed contained no power of sale, yet he afterwards had a copy of the deed before him; and, further, when it is considered that there was a long consultation at the hotel in Newcastle between the plaintiffs and Sweetland and Stokes, it is difficult to avoid the conclusion that they were informed that Brown was acting in a manner not authorised by the trust deed, and were at all events put on inquiry. Further, it does seem a strange thing that both of them, having undertaken to try to raise funds or to procure a purchaser, should announce their failure to do so, and then should within a short time afterwards become themselves the purchasers. On the whole, I also think that part of his Honour's decision cannot be disturbed. I think, therefore, that substantially his Honour's

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Solicitor and client—Authority to institute proceedings in client's name—Challenge to produce authority—Answer to suit—Costs.

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Defendants having a claim on plaintiff company issued a writ to recover the amount, and the writ being returned *non est inventus*, took proceedings by way of foreign attachment under the *Absent Defendants Act*. W., who had acted as solicitor for the plaintiff company on previous occasions, refused to accept service of the writ originally issued by defendants, but on defendants taking further proceedings, filed a claim in the name of the plaintiff company, and obtained an injunction *ex parte*, restraining defendants from proceeding with their action at law. On the motion to continue the injunction, defendants took the objection that W. had no authority to institute the suit, but

Manning, P.J., overruled the objection, and continued the injunction till the hearing.

Held, on appeal, that the defendants had a right to call on W. to produce his authority, and that as he had failed to do so the injunction must be dissolved and the suit dismissed with costs as between solicitor and client, to be paid by W.

THIS was an appeal by defendants to set aside an injunction granted against them on 5th March, 1886, by *Manning, P.J.* It appeared that some three years prior to the date of the proceedings Messrs. Briscoe, Drysdale and Co., the appellants, sold to the respondents—the Hawkins Hill Consolidated Gold-mining Company, which was registered, not in this colony, but in England—a quantity of machinery for use upon the company's property in this colony. The contract price, 362*l.* 7*s.* 8*d.*, was not paid and remained unpaid up to April, 1885. At that time a bill was drawn, apparently at the suggestion of Messrs. Want, Johnson and Co., solicitors, by appellants upon the company in England for the amount, together with interest. The bill was, however, dishonoured for some reason, which was stated at the time. Then, in July or August, 1885, the Hawkins Hill Company was placed in liquidation, but whether voluntarily or compulsorily did not clearly appear, though it seemed to have been a voluntary liquidation. In December, of the same year, the appellants issued an ordinary summons to obtain payment of the debt, but were informed by Mr. Want that there was no one in the colony to accept service. On the 3rd December the writ was returned *non est inventus*, and on the 29th December the

1887. appellants took proceedings and issued a writ of foreign attachment under the *Absent Defendants Act*. On the 8th January, 1886, Mr. Want, on hearing that the writ had been issued, wrote to Messrs. Creagh and Williams, the attorneys for Briscoe and Co., informing them that the company was in liquidation, and that a cablegram might be sent to the company's agent in England, which it was hoped would bring about a satisfactory settlement. On the 18th of the same month Want, Johnson and Co. wrote a further letter to Messrs. Creagh and Williams, warning them against further proceedings in the suit, and stating that they had received a cablegram that 400*l.* had been remitted. Messrs. Creagh and Williams, having no knowledge of the liquidation of the company, declined to stay further proceedings, and on the 19th a statement of claim was filed in equity by Messrs. Want, Johnson and Co., in the name of the plaintiff company, for an injunction to stay the proceedings which had been instituted by Messrs. Briscoe and Co. It appeared also that the sum of 302*l.* was afterwards tendered to Mr. Trueman, manager for the appellants, who was willing to accept it on account; but Messrs. Want and Johnson refused to comply with that condition, and it was not tendered to Messrs. Creagh and Williams. On the 5th March the injunction motion came on, and an order was made that the injunction should be continued to the hearing. An objection was taken at the hearing that Messrs. Want, Johnson and Co. were not authorised to take these proceedings, but *Manning*, P.J., overruled the objection on the ground that until the plaintiff interfered, the attorney was supposed to have the necessary authority to bring the suit. Against that decision the defendants appealed on the following grounds:—1. That the defendants having challenged the authority of the plaintiff company's solicitors on the record to institute this suit, and the said solicitors not having produced any such authority, his Honour should have dismissed the suit, or, at all events, the motion on which the order now appealed against was made, with costs to be paid by such solicitors. 2. That the plaintiff company had no equity to obtain the injunction now appealed against for the following reasons, viz.: The liquidation of the plaintiff

company was not proved; the liquidation, if proved, was an English liquidation only; it sufficiently appeared that the plaintiff company was paying its creditors 20s. in the pound; if the plaintiff company's solicitors on the record had authority to institute this suit in their name, they had authority to enter an appearance for them in and to defend the present defendants' action at law, and should have done so, in which case it would have been unnecessary to invoke the equitable jurisdiction of this Court. 3. In no case should his Honour have granted an injunction against the prosecution by the defendants of their action at law.

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Salomons, Q.C. (Walker with him), for the appellants. We challenged the solicitors to produce their authority to institute this suit in the Court below, as we were entitled to do; but up to the present time they have produced no authority whatever to institute this particular suit, or proceedings generally, for the nominal plaintiffs.

[OWEN, J. Assuming that the solicitors have a general authority to act for the plaintiffs, would not that entitle them to defend an action; and is not the course they adopted in this instance a mode of defence?]

The solicitors in this instance have not shown that they have such a general authority. The point is an important one, since a solicitor taking proceedings without authority cannot render the plaintiff on the record liable for costs in the event of the defendant succeeding. The only method of finding out if a solicitor has authority to institute a suit is by challenging him to produce that authority, as it is impossible for defendant to prove a negative. Besides, it is alleged here that the company is in liquidation, and, if that is the case, any authority given by the company before going into liquidation would have to be renewed by the liquidator to be of any value. The case of *Schjott v. Schjott* (1) is on all fours with the present case. He also referred to *Westlake on Private International Law*, p. 144.

(1) 19 Ch. D. 94.

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Simpson (Cohen with him), for the respondents. There is no authority for the proposition that if a solicitor institutes a suit in the name of some person he can be challenged to show the defendant his authority to institute proceedings. In every case the motion to dismiss the bill must be a special motion on notice. A challenge at the hearing has in no case been held to be sufficient. The proper mode of proceeding where a solicitor acts without authority is indicated in *Daniell's Chancery Practice* (5th Ed.), p. 260, and has not been adopted here. In every case the motion has been made by the plaintiff whose name was used without authority, not by the defendant. *Schjott v. Schjott* (1) does not touch the present case. There a married woman sued by her next friend; and in such a case a written authority has been rendered necessary by statute.

The course we have adopted here is really a mode of defence by asserting an equity to prevent the unfair exercise of legal rights, and it is laid down (2) that, under a general authority, a solicitor may defend a suit for his client: *Kerr on Injunctions*, p. 618. If the Court make any order against us, it should only be an order for the stay of proceedings until such time as we produce the necessary authority. He also referred to the case of *Hubbard v. Phillips* (3).

Salomons, Q.C., in reply, asked that the plaintiffs might have their costs as between solicitor and client: *Equity Act of 1880*, s. 78. He also referred to *Robson v. Heaton* (4).

STEPHEN, J. For my part I should have been glad to have had the opportunity of preparing a written judgment in this case; but I feel that if I postponed giving judgment until I had time to do so, it might be delayed for a month or two, and for this reason we have decided to deliver judgment at once. It appears that some three years prior to the commencement of proceedings in December, 1885, the defendant sold to the plaintiff company certain machinery and plant, to be used on property held by them in this colony. The plaintiff company, though owning property in this colony, was, however, registered

(2) Dan. Ch. Pr. 260.

(3) 13 M. & W.

(4) 1 T.B. 62.

in England, and the affairs of the company seem to have been conducted entirely by the office in England, the only representative of the company in this colony being Mr. Marshall, the resident manager of the mine. The defendants are a firm of merchants carrying on business in this colony, and have an office in Sydney. In April, 1885, the contract price of the machinery supplied by the defendants not having been paid, the defendants, after consulting Messrs. Want, Johnson and Co., drew a bill on the plaintiff company for the amount of the purchase money and interest, but that bill was dishonoured, for reasons which it is not necessary to state. Before this time the defendants had several times applied to the plaintiff company for payment of their debt, but without effect. In July or August of the same year the company went into liquidation, whether voluntary or not we do not know, and I think it is not material to the present case to inquire. The effect of this seems to have been not to vest the property of the company in the liquidator, but merely to empower him to bring actions in the name of the company. The fact that the company was in liquidation came to the knowledge of Messrs. Want, Johnson and Co. in the month of October, 1885. On December the 2nd in that year the defendants took proceedings to obtain payment of the sum of money which had for so long been owing to them by issuing an ordinary writ of summons, and according to the evidence of Mr. Williams and of Mr. Truman, the manager of the defendants' business in Sydney, they were informed by Mr. Want that there was no one in the colony who could accept service for the company. On the following day the writ was returned, endorsed, "*non sunt inventi*," and accordingly, on the 29th of the same month, the defendants took proceedings by writ of foreign attachment, under the *Absent Defendants Act*, which provides a number of safeguards against any injustice being done to a defendant not resident in the colony. The next step in the proceedings was that Marshall, who in reality appears to have been little more than a caretaker, was summoned to appear as garnishee on the 15th of January, 1886, in order to ascertain what property the company had which could be made available for attachment. On the 7th of January, 1886, Mr. Want is informed by Marshall

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that the writ is about to issue, and on the 8th he writes to Messrs. Creagh and Williams, and informs them that the company is in liquidation, and that in his opinion they might arrive at a satisfactory settlement by sending a cablegram to the liquidator in England. At this time, so far as we can see, Mr. Want made no attempt to take up the position that he had authority to institute proceedings in Equity with a view to restraining the defendants from proceeding with their action at law; and Marshall not only does not instruct him to take such proceedings, but actually cables to his principals in England for money to cover the defendants' claim, thus showing that in his opinion it was one which should have been met at once. On January the 18th, Mr. Want writes again to Messrs. Creagh and Williams, warning them not to proceed further in the matter, and stating that his firm had received a cablegram informing them that 400*l.* had been remitted. This cablegram seems to have been in answer to one sent by Mr. Want, and we may probably infer that Mr. Want had informed the liquidator that proceedings had been commenced by the defendants. However, the cablegram received by Messrs. Want, Johnson and Co. contained no instructions to commence a suit, and in fact the remittance of 400*l.* was an admission that the debt was due. In answer to the last letter, Messrs. Creagh and Williams write to Messrs. Want, Johnson and Co., declining in any way to stay proceedings, and stating that they had no knowledge of the fact of the company being in liquidation. I may point out here that the remittance alluded to did not arrive till about two months subsequently. On the 19th of January Messrs. Want, Johnson and Co. file a claim in Equity, praying for an injunction to restrain the defendants from proceeding with their action at law, and either that or the amended statement of claim contains a note to the effect that the Hawkins Hill Co. is of Hawkins Hill in the colony of New South Wales, a statement not less incorrect than misleading. On the 20th of January, an injunction is obtained *ex parte*, and the hearing of the motion is postponed till the 5th of March. On the 3rd of March the promised remittance arrives, and a tender is made to Mr. Truman of 303*l.* as a settlement in full, but as he declines

to take that amount except as a payment on account, the tender is withdrawn. Messrs. Creagh and Williams then request Messrs. Want, Johnson and Co. to tender the money to them, but the request is not complied with, and on the 5th of March, when the motion to continue the injunction comes on, the injunction is continued till the hearing, and against that order the defendants now appeal.

On the hearing of the motion to continue the injunction, Mr. *Walker* took the objection that Messrs. Want, Johnson and Co. were not authorised to institute these proceedings, but the Primary Judge overruled the objection on the ground that until the plaintiffs interfered, the solicitor on the record must be presumed to be invested with the necessary authority.

The first ground stated in the notice of appeal is as follows:—
 “That the defendants having challenged the authority of the plaintiff company’s solicitors on the record to institute this suit, and the said solicitors not having produced any such authority, his Honour should have dismissed the suit, or, at all events, the motion on which the order now appealed against was made, with costs to be paid by such solicitors.” Assuming that the solicitors in question were acting generally as the plaintiff company’s solicitors in this colony, this ground of appeal seems to me to raise the following points:—1. Where a solicitor is acting generally for a client, is a special authority necessary to enable him to institute a suit on behalf of that client?

2. Can a defendant call on the plaintiff’s solicitor on the record to produce the authority on which he acts?

3. Did the defendants in this case take the point? Was it fairly in issue in the Court below?

4. Was the occasion on which the point was taken the proper occasion on which to take it?

5. If successful, would the objection be an answer to the motion for an injunction?

6. If all these questions are answered in the affirmative, what are the consequences?

As to the first question, I am of opinion that such an authority

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is necessary. The mere fact of acting generally as solicitor for a client does not *per se* confer any right to institute a suit on his behalf. I give no opinion as to what is sufficient to constitute such an authority; it may of course be written or verbal, and possibly may in some cases even be implied from surrounding circumstances. All I decide now is that an authority of the nature I have denoted is necessary.

As to the second question, I have come to the conclusion, after grave consideration, that that also must be answered in the affirmative. I think the answer to this question may be most readily found in the answer to the question whether, where a suit is brought without authority, the plaintiff on the record would, in the event of the success of the defendant, be liable for costs. It has not been seriously contended that the plaintiff in such a case would be liable, and if this is so, why should the defendant not be permitted to challenge the authority of the solicitor? Must he allow the suit to proceed, and in the event of his success look to the solicitor, and to him alone, for his costs? It was pointed out in the course of the arguments that if we hold that a solicitor cannot in cases of emergency institute a suit on behalf of a client in virtue of his general authority as solicitor, our decision may involve considerable hardship in the case of persons absent from the colony; but it appears to me that a decision the other way might involve at least equal hardship on a defendant, and I think the power of instituting suits at their own will, and perhaps for their own advantage, would be a dangerous one to put into the hands of solicitors. Besides a person absent from the colony has a remedy in his own hands, for it seems to be conceded that if a client give his solicitor authority under a power of attorney to institute suits generally no additional authority would be necessary to enable the solicitor to institute any particular suit. The Primary Judge appears to have held that until the plaintiff himself interferes, the solicitor must be assumed to have the necessary authority, but from this decision I feel constrained respectfully to dissent. In this very case indeed the plaintiff company might never have known of the institution of this suit, and consequently never have interfered, and in that event what would have been the position of the

defendants? If the plaintiff does know of the institution of the suit, and yet takes no steps to stop the proceedings, it would prove conclusively that he recognised the authority of the solicitor; but where he has no such knowledge, the defendant, unless he is permitted to interfere, has only the solicitor on the record to look to for his costs instead of the plaintiff. I think, too, that the case of *Schjott v. Schjott* (5) is an authority for the proposition that a defendant has, equally with a plaintiff, the right to call upon the solicitor on the record to produce his authority. As to the third question, I think the authority was fairly challenged. Mr. Williams, in one of his affidavits, expressly alleges his belief that Messrs. Want, Johnson and Co. were not properly authorised to take proceedings, and in my opinion he had ample grounds for his belief; for it is in evidence that Mr. Want himself told him that he had no authority to accept service of a writ, and if that were so, how could he have authority to institute this suit?

The fourth and fifth questions may be conveniently answered together. The injunction having been obtained *ex parte*, I think this objection was taken on the proper occasion. In substance, what the defendants said was—"There is no plaintiff to obtain an injunction to restrain further proceedings on our part in our action at law." It has been contended that, as in the case of *Schjott v. Schjott* (6), there should have been a separate and distinct motion upon notice to dismiss the suit, but it appears to me that as the solicitors for the plaintiff company were before the Court, such a course was unnecessary. However, I give my opinion on this point not without hesitation.

In answer to the 6th question, I think the result is exactly as if there were no plaintiff at all, and the injunction should be dissolved. No one is responsible to the defendants, and why should they be hindered by the injunction from obtaining their just rights, when every merit in the case is in their favour? though as far as the dry points of law are concerned, I am in no way influenced in my consideration of them by the merits of the case. If the injunction is to be dissolved and the suit dismissed, it follows as a matter of course that Messrs. Want,

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Johnson and Co. will have to pay the costs, and costs will be taxed as between solicitor and client.

DEFFELL, J., and OWEN, J., concurred.

Appeal upheld. Injunction dissolved. Suit dismissed with costs as between solicitor and client, to be paid by plaintiff's solicitor on the record.

Solicitors for plaintiff: *Want, Johnson & Co.*

Solicitors for defendants: *Creagh & Williams.*

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Oct. 24.
F. C.

Re THE UNDERWOOD ESTATE ACTS, IN THE MATTER OF FELTON'S PETITION.

Tenant for life—Mortgage—Tenant-in-tail in remainder, joining to bar estate tail—Estate tail barred for special purpose of mortgage.

T. U. being seised of certain lands for an estate for life, with remainder to his children as tenants-in-common in tail general, mortgaged his life estate to one R. to secure an advance of 800*l.*, all his children being at the time infants. Subsequently, one of his children, M., the wife of R. McD., having attained her majority, R. advanced an additional 500*l.* on a mortgage of other property settled in the same manner. In this second mortgage R. McD. and his wife joined, barring the estate-tail in remainder vested in M. The mortgage followed in terms s. 16 of the *Registration Act*, and purported to operate as a conveyance by R. McD. and M. (his wife), of the lands and premises in which M. had an estate-tail, in fee simple to R., barred of all estates, &c., that were to take effect after the determination or in defeasance of such her estate-tail.

Held, that though the express terms of the mortgage were sufficient to bar the estate-tail of M. for all purposes, yet the intention of the parties being merely to give R. a better and larger security, the estate-tail of M. was barred only for the special purpose of the mortgage.

THE facts of the case were simple, and are fully stated in the judgment of the Court. The case came before the Full Court on a decree *pro formâ* of Manning, P.J., who ordered the case to be reheard before the Full Court under s. 77 of the *Equity Act*.

C. J. Manning (George Knox with him) for the Felton family and James Underwood.

Darley, Q.C. (Walker with him), for Messrs. Rogers & Dixon.

M. H. Stephen, Q.C. (*Gordon* with him), for the *Lisson* family.

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Plomley in person.

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The following authorities were referred to in the course of the arguments :—*Tanner v. Radford* (1), *Doe v. Rolf* (2), *Tarleton v. Liddle* (3), *In re Van Hagen* (4), *Sanders on Uses*, I. 99; *Preston on Conveyancing*, II. 64; *Jackson v. Innes* (5), *Dawson v. Bank of Whitehaven* (6), *Nightingale v. Earl Ferrers* (7), *Whitbread v. Smith* (8), *Barnett v. Wilson* (9), *Lord Lilford v. Attorney-General* (10), *Martin v. Strachan* (11), *Wilkinson v. Duncan* (12), *Re Chesterfield's Trusts* (13), *Lewin on Trusts*, p. 276; *Gilbert on Uses*, *Meek v. Chamberlain* (14), *Franks v. Bollans* (15), *Fisher on Mortgages*, II. 746; *Note to Co. Lit.*, 208 A.; *Davidson's Conveyancing Mortgages*, 525; *White and Tudor's L.O.*, p. 1041; *Ruscombe v. Hare* (16), *Olark v. Burgh* (17), *Stanfield v. Hallam* (18), *Re Betton's Trusts* (19), *Hipkin v. Wilson* (20), *Plowden v. Hyde* (21), *Whitbread v. Smith* (22), *Grieverson v. Kersopp* (23), *Burrell v. Baskerfield* (24), *Wilson v. Knubley* (25), *Coote on Mortgages*, p. 1080; *Steed v. Preece* (26), *Walker v. Shore* (27), *Ex parte Oramer* (28), *Jones v. Davies* (29), *Atkinson v. Smith* (30), *Edelston v. Collins* (31), *Reeve v. Hicks* (32), *Heather v. O'Neil* (33).

FAUCETT J. In this matter, the Primary Judge, acting under s. 77 of our *Equity Act*—as I understand, without hearing

(1) 6 Sim. 21.

(2) 8 A. & E. 650.

(3) 17 Q.B. 390.

(4) 16 Ch. D. 18.

(5) 1 Bligh 104.

(6) 6 Ch. D. 218.

(7) 3 P.W. 207.

(8) 1 Drury 531; 3 de G.M. & G. 727.

(9) 2 Y. & C. Ch. 407.

(10) L.R. 2 H.L. 63.

(11) 5 T.R. 107.

(12) 23 Beav. 469.

(13) 24 Ch. D. 643.

(14) 8 Q.B.D. 31.

(15) 3 Ch. Ap. 717.

(16) 2 Bligh N.R. 192.

(17) 2 Coll. 221.

(18) 29 L.J. Ch. 173.

(19) L.R. 12 Eq. 553.

(20) 3 de G. & S. 738.

(21) 21 L.J. Ch. 796; 2 Sim. N.S. 171.

(22) 23 L.J. Ch. 611.

(23) 2 Keen 653.

(24) 11 Beav. 525.

(25) 7 East. 128.

(26) L.R. 18 Eq. 192.

(27) 19 Ves. 387.

(28) 1 Sm. & G. 32.

(29) 8 Ch. Div. 205.

(30) 3 de G. & J. 186.

(31) 3 de G.M. & G. 1.

(32) 2 Sim. & St. 403.

(33) 2 de G. & J. 390.

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argument—made a decree or order *pro formâ*, and directed the case to be heard or reheard before the Full Court ; and—whether properly before the Court or not—it has been treated as if it were an appeal from a decision of his Honour. The case was argued at great length before the late Chief Justice, *Sir James Martin*, myself, and *Sir George Innes*, by *Mr. Plomley* on his own behalf, and by counsel representing the various other parties interested. Since the argument *Sir James Martin* died without having prepared his judgment, and at the request of the parties, and by an arrangement between them, I now give my judgment in the case.

This is one of those numerous cases that have arisen out of the will of the late James Underwood, and the *Underwood Estate Acts* ; and the questions that are now to be considered arise upon a report of the Master ; and the principal of these questions depends on the construction of a deed of mortgage, dated February 28, 1859, and mentioned in the report.

As stated in the report, Thomas Underwood was, under the will of his late father, James Underwood, possessed of an estate for life in the whole of certain lands, mentioned in the first schedule to the deed of mortgage of the 28th of February, 1859, known as the Flemington property, and in one-fifth of certain other lands mentioned in the second schedule to the said deed of mortgage, known as the Paddington property ; and the remainder dependent on his said life estate was, by virtue of the said will, vested in his children as tenants-in-common in tail general. Of these children, Maria, who was married to Randell McDonnell, had attained the age of twenty-one years only a few months before the date of the mortgage, all the other children of the said Thomas Underwood being then under age.

Thomas Underwood had, by a previous deed, mortgaged his said life-estate in both the properties mentioned, to John Rodd, to secure the repayment of the sum of 800*l.* advanced to him by Rodd. And, in order to obtain from Rodd a further advance of 500*l.*, making a consolidated sum of 1300*l.*, he proposed to secure the said sum of 1300*l.*, by adding to the mortgage he had previously given a mortgage of his life estate in other lands and premises, mentioned in the third schedule to the deed of

mortgage of the 28th of February, 1859, and known as the Underwood Street property; and by inducing Randell McDonnell and Maria, his wife, to join in the new mortgage, and to bar the estate-tail in remainder vested in her, and in him in her right. The proposal was accepted, and accordingly Thomas Underwood duly executed the deed of mortgage now under consideration, and Randell McDonnell and Maria, his wife, joined in it.

The question now is, whether the deed of mortgage, so executed by Randell McDonnell and Maria, his wife, merely barred the estate-tail of Maria McDonnell for the purposes of the mortgage, and as a security to Mr. Rodd, or whether, going beyond the purposes of the mortgage, it barred the estate-tail for all purposes, and so as to bring about an alteration in the limitations of the lands and premises comprised in the estate-tail.

It is admitted that, according to the express terms of the deed of mortgage, and by s. 16 of our *Registration Act*, 7 Vic. No. 16, Randell McDonnell and Maria, his wife, conveyed the lands and premises, in which Maria McDonnell had an estate-tail, in fee simple to Rodd, barred of all estates, &c., that were to take effect after the determination, or in defeasance of such, her estate-tail. But it is contended that as the intention of the parties was to give Rodd a better and larger security, the act of Randell and Maria McDonnell in barring the estate-tail, although complete and valid in favour of Rodd, ought not to operate, and did not in fact operate, beyond that intention; and accordingly, that, whenever the mortgage debt was paid off and the security released, the estate-tail, which had been barred only for the special purpose of the mortgage, would revert to its former condition, with all the estates and limitations dependent on it revived, as if they had never been barred. And it is further contended that some of the expressions in the mortgage deed support this view. For, after reciting the proposal on the part of Thomas Underwood, to secure the further advance by giving the additional security, and by inducing Randell McDonnell and Maria, his wife, to bar the estate-tail, it is recited that Randell McDonnell and Maria, his wife, had agreed to join in these

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presents "for the purposes aforesaid," as if these latter words meant solely for the purposes of the mortgage; so that their joining should have no operation beyond, or outside of, the mortgage deed. And this view, it is contended, is confirmed by the words of the clause providing for reconveyance by the mortgagee after redemption, the words being, "that the mortgagee will, at the request and costs of the said mortgagors, reconvey the said hereditaments unto the said mortgagors respectively, or as they may respectively appoint, according to their original respective estates or interests therein, &c."; the words, "original respective estates or interests," meaning, as regards Randell and Maria McDonnell, the estate-tail which had been barred solely for the purposes of the mortgage, and so as not to operate, or have any efficacy, beyond or outside of those purposes.

As Maria McDonnell, after executing the mortgage, died in 1860, without issue, and leaving her father, Thomas Underwood, her heir-at-law, on the decision of this question will depend the estate which devolved on him as such, her heir-at-law, upon her death; and on it also will depend the interest, if any, which Mr. Plomley, Mr. Rogers, and Mr. Dixon obtained in the lands and premises comprised in Maria McDonnell's estate-tail, by their purchase from the official assignee of Thomas Underwood's insolvent estate.

It is said that if s. 21 of the *Fines and Recoveries Act* (3 & 4 Wm. IV. c. 74) were in force in this colony, the present question could not arise. But that Act is not in force here; still, if s. 21 of that Act contained a mere declaratory enactment, I am entirely disposed to think I should feel myself bound by it, and bound to apply it. But that section goes beyond a mere declaratory enactment, and introduces a new state of the law. It may, therefore, I think, be left out of consideration. And s. 16 of our *Registration Act* (7 Vic. No. 16) merely simplifies the process of fines and recoveries, by giving to deeds, executed in the manner prescribed, the same effect which a fine or recovery would have had. But it does not appear to me to give a greater effect to a deed so executed—if executed for the purpose of a mortgage—than a fine or recovery, made for a similar purpose,

would have previously had. Thus, contrary to the English enactment, it leaves still open the question of intention—whether the intention is that the deed or conveyance should be absolute or only for a particular purpose. With this in view I shall now consider the matter.

The general principle by which Courts of Equity have been guided in questions of this kind, and which seems applicable here, is laid down in *Fisher on Mortgages*, Vol. II., p. 746, par. 1210, v. 12, that “a mortgage being nothing more than a transaction for raising a loan, there is a presumption against an intention to alter the previous rights of the parties, further than is necessary to effect that object. The mere reservation, therefore, of the equity of redemption, in a manner different from the former ownership of the estate, whether it be made expressly, or by a declaration (where the mortgage is made in exercise of a power of appointment), that the appointment shall be void on payment of the money, is considered (fraud not being in question) to arise from inaccuracy or mistake, which may be explained and corrected by reference to the state of the title as it stood before the mortgage.” And in *Coots on Mortgages*, p. 523 (3rd edition), in reference to the question whether it is intended by the parties, in making the mortgage, that the equity of redemption should be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses, it is said:—“These questions have generally arisen in mortgages by husband and wife; and the principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife’s estate, although the equity of redemption is by the mortgage-deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a *resulting trust* for the benefit of the wife and her heirs, and that the wife and her heirs shall redeem, and not the heirs of the husband.”

In connection with the principles thus laid down, a great number of cases were cited during the arguments for the purpose of showing the effect of a mortgage by the husband and wife upon the wife’s interest. I have considered all these cases. But

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in *Jackson v. Innes* (34), the principles which govern such transactions appear to have been settled; and all the subsequent cases followed the principles there laid down. At page 114, referring to the case of *Ruscombe v. Hare* (35), Lord *Redesdale*, in his judgment, says:—"The principle is this—that in a mortgage the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the former state of the title, as it was before the mortgage." And in reference to the case of *Broad v. Broad* (36), Lord *Redesdale* says that in a bill of review, it was suggested that the decree was founded on an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved; and that Lord *North*, then keeper, admitted the objection, and took no notice of the agreement, but affirmed the decree, because, when the wife joined in the fine of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest; but there resulted a trust for her, when the mortgage was paid, to have her money again, as if it had been a mortgage on condition, and the money paid on that day. Referring to *Rowell v. Whalley* (37), his Lordship says:—"Here is a case of a distinct declaration, in no manner depending upon the promises for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage." After referring to these cases his Lordship says, at p. 118:—"The rule fixed by those cases is no more than this—where the equity of redemption is reserved to the husband, upon a mortgage of the wife's estate, and there is nothing more in the transaction, the Court holds that no alteration of the previous rights of the parties is effected. But it is an exception to that rule where other circumstances occur, affording evidence of an intended alteration of rights."

The last passage in this judgment to which I shall refer is at p. 128, where Lord *Redesdale* says:—"Where the declaration of the fine refers simply to the operation of the deed as a mortgage;

(34) 1 Bligh 104.

(35) 2 Bligh N.E. 192.

(36) 2 Ch. C. 161.

(37) 1 Ch. E. 116.

where it is simply a declaration that, the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate, where the limitation of the estate is perfectly distinct, it seems to me the rules which have been established in the cases of resulting trusts do not in any degree apply."

Applying the principles thus laid down to the present case, if the mortgage-deed now under consideration was merely a mortgage by the husband and wife of the wife's estate-tail, in which the wife barred her estate-tail, I see nothing in the form or terms of the deed to shew that anything more was intended than to give a security to the mortgagee. I see nothing to shew that it was intended to make a new settlement of the original estate-tail. The whole scope of the deed, and every expression that could bear upon the question seem to me to shew the contrary—to shew that the whole and sole object of the deed, so far as Randell and Maria McDonnell were concerned, was to give a security to the mortgagee. But when we consider that it is not the case of a wife joining her husband in mortgaging her estate-tail, in which the husband would or might have an interest to a certain extent, but the case of a daughter who had come of age just two months before consenting to mortgage her estate-tail, in which the father had no interest, solely and entirely for the benefit of the father, and as a security for his debt, it seems to me that the presumption, which in equity is always *prima facie*, in favour of the transaction being a mortgage, and a mortgage only, is greatly strengthened. We are told by a high authority that different minds may form different conclusions from the same state of facts. That may be so. But when in connection with the previous recitals in the deeds, I consider the father's proposal to Mr. Rodd in order to obtain a further advance, namely, firstly, to give a mortgage over other lands in which he had a life-estate, and not previously mortgaged, and, secondly, to induce his daughter and her husband to bar her estate-tail; and when, along with this proposal, I consider the

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consent of the daughter and her husband to join in the deed for the purposes aforesaid, I can see no other reasonable conclusion that can be drawn from these statements but that their consent to join in the mortgage deed was for the benefit of the father, and to enable him to get the further advance from Rodd; and that their consent to bar the estate-tail was to give a security to Rodd for the same purpose, and for no other purpose.

Great stress has been laid upon the interpretation clause, as it is called by Mr. *Plomley* and the counsel who supported the same interest. But it is difficult to see how a form of words common in all such deeds, and the repetition of which is by that clause rendered necessary, can show any intention to alter the limitations of the original estates, or can have the effect of doing so. At most—so far as regards the estate-tail—it appears to me they can only be treated, if at all necessary, as completing formally the conveyance in fee of that estate. And so the effect of that conveyance will still remain the same.

I now come to the redemption clause. And here it must be observed that as a condition of the mortgage it was necessary to bar the estate-tail, so as to give the mortgagee a security over the estate in fee, instead of a security over a limited estate, which, by the death of the tenant in tail—an event which, in fact, happened—might become worthless; and, accordingly, the security is, in any event, good to him over the estate in fee. To give him such security in fee was clearly the very object for which the estate-tail was barred. And, without drawing any fine distinctions as to the effects of fines and recoveries, I will take for granted, on the authority of *Tanner v. Radford* (38), and other similar cases which were so largely referred to during the argument, but which had nothing to do with a mortgage, that the effect of a fine or recovery, when no uses are declared, is to leave the fee, into which the estate tail is converted, in the tenant in tail. From this I think it would follow that as, by the form of the deed of mortgage, Maria McDonnell acquired an estate in fee-simple, in those lands and premises of which she had previously been tenant in tail, the uses, none being declared, resulting to her in fee-simple, so upon her death without issue,

such fee-simple would devolve upon her father, Thomas Underwood, as her heir at law. That, I think, would be the effect, if the transaction is to operate beyond the requirements of the mortgage. But it appears to me that the words of the redemption clause shew that there was no intention that the transaction should so operate. The condition is that, on payment of the mortgage debt, the mortgagee will, at the request and costs of the mortgagors, reconvey the said hereditaments unto the said mortgagors respectively (or as they shall respectively appoint), according to their original respective estates and interests therein.

Passing over, for the present, the power of appointment, the original estate of Maria McDonnell was, it appears to me, her estate-tail. I must confess that I have had considerable doubt (probably caused by the force with which the matter was pressed in argument) whether these words might not refer to the estate in fee in her lands which is conveyed to Rodd. But, looking at the entire character of the transaction, and considering that it is recited in the deed that Maria McDonnell had originally an estate-tail, and that she agreed to join in the deed, and to bar her estate-tail, for the purpose of giving additional security to Rodd, I think, on the whole, that the natural and most reasonable construction is to refer the words in question to her original estate-tail. If my view on this point is correct, the inference, I think, follows that the tenant in tail, while barring her estate for the purpose of giving a security, never intended to alter the original limitation of the estate. There is no limitation or declaration of uses; there is no alteration or extension of the estate except such as is connected with the mortgage—and this seems to be the great test in all the cases.

In *Reeve v. Hicks* (39), the principle is briefly but clearly stated. In that case the Court held that the original limitation was altered, and that there was a new settlement. The Vice-Chancellor, Sir John Leach, said:—"This case is not distinguishable in principle from *Innes v. Jackson*. The limitation of the uses of the fine to the husband and his heirs has no connection with the purpose of the mortgage, or the proviso of

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redemption, but is altogether a new settlement which defeats the heirs of the wife."

In *Wood v. Wood* (40), the Master of the Rolls says:—"It is established law that when an estate is mortgaged, the equity of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses, or to the trusts of the original settlement." In this case he asks, "Can there be any doubt as to the intention of the parties? The recital distinctly shews that the wife had nothing more in view than to assist her husband in raising the money." In reference to these observations, I would say: Can there be in the present case any doubt as to the intention of the parties? Does not the recital shew that Mrs. McDonnell had nothing more in view than to assist her father in raising the money.

"It is a well established principle," says Lord *Cranworth*, L.C., "that in the absence of express stipulation to the contrary, a mortgage is to be considered in this Court a mere charge taking out of the property as much as is necessary for accomplishing the objects, and leaving all not so abstracted as it stood before the mortgage. The equity of redemption, therefore, attaches on the estate of the mortgagors, with all the same rights, restrictions, and qualifications to which his legal estate has been previously subject": *Plowden v. Hyde* (41).

In *Whitbread v. Smith* (42), *Kindersley*, V.C., acting on the same principle, held that there was an alteration in the old limitations, and apparently one of the grounds on which he acted was that the wife got a larger estate than she had before, and that she was benefited by the transaction. But, on appeal (43), the Lords Justices reversed the Vice-Chancellor's decision, and held that there was no intention to alter the old limitations. Lord *Cranworth*, L.C. (44), after noticing with approval the principle as laid down by the Vice-Chancellor, says:—"But when a mortgage is executed the intention *primâ facie* is, that it is a mortgage, and a mortgage only; and it is not on slight expressions in the proviso for redemption that this Court will infer any

(40) 1 Beav. 183.

(41) 2 De G. M. & G. 635.

(42) 17 Jur. 725.

(43) 3 De G. M. & G. 725.

(44) Page 737.

contrary intention. Where there has been a different construction there have been special circumstances to take it out of the rule." The Lords Justices took no notice of the circumstance that the wife had got a benefit. It is to be observed also that in the deed in this case there was a power of appointment, but that did not affect the decision.

In *Dawson v. The Bank of Whitehaven* (45), the question as stated by *Jessel, M.R.*, was whether, under the old law, when a wife joined with her husband in levying a fine of his freehold estate, and they mortgaged the estate in fee, her right to dower, which was destroyed at law, subsisted in equity for any purpose, and whether she had any rights against her husband's estate in the character of a surety for his debt in respect of that inchoate right of dower which she had destroyed at law. The Court held that she had not, as the Court of Equity did not recognise the right of dower. The case hardly touches the present case, but for some observations of *Cotton, L.J.* (46). He says:—"No doubt it is true as a general proposition, that where a wife mortgages her property for her husband's debt, she is considered as parting with it solely for the purposes of the mortgage." And (47) he says:—"As regards the authorities which have been cited, it is perfectly clear that Sir Thomas *Smith*, in *Jackson v. Parker*, was simply saying that, notwithstanding the proviso for redemption professed to give to the wife a right larger than her right to dower, it does not alter the rights of the parties if the wife redeemed." His lordship continues:—"She would only get a right in the estate such as she had before, not a right to dower; and the Court of Equity would not take the estate (though it was her husband's originally) from her, except on the terms of allowing her her dower out of it." These last observations seem to show that it makes no difference that by the proviso for redemption the wife seems to get a larger estate or interest than her original one.

Meek v. Chamberlain (48) seems to me a strong case in support of the view I am taking. There the husband did grant and convey, and the wife, "for the purpose of extinguish-

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(45) 6 Ch. D. 218.

(47) In p. 229.

(46) In p. 228.

(48) 8 Q.B.D. 31.

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ing her rights to dower," did grant and release, &c. These words are in substance the same as the words in the mortgage deed under consideration, viz., Randell McDonnell and Maria, his wife, in order to defeat and destroy all estates tail of the same Maria McDonnell, &c., and in order to assure and limit the inheritance in fee simple, &c. Yet the Court held in that case that, as the money was paid and the husband died seised of the legal estate, the right to dower was not absolutely extinguished, but only for the purposes of the mortgage.

I shall only further refer to *Powell on Mortgages* (49), where it is shown that a fine, which was the common form by which a tenant in tail mortgaged his estate, so as to give to the mortgagee an estate in fee simple as his security, was in Equity treated as a partial or absolute bar according to the intention of the parties. And (50) it is stated that if a tenant in tail mortgage lands, the Court of Chancery will ultimately compel him to suffer a recovery, that being incidental to his making a good title, or would order him to make a good title, which would be done by levying a fine or suffering a recovery, and in *note D.* it is stated that when a tenant in tail made a mortgage without levying a fine, with a covenant for further assurance, and Lord Keeper *Bridgman* refused to enforce the covenant against his issue, although his lordship admitted that the father might have been compelled to have levied a fine or suffered a recovery, and because the issue in tail was not bound, either at law or in equity, to complete any contract or agreement made by their ancestor respecting the estate-tail. The issue in tail claim independently, from the person by whom the estate-tail was originally granted, not from the ancestor.

I am afraid I have unnecessarily cited so many authorities; but as the case was argued at very great length, and, I may add, with great ability, it seemed to me desirable to bring together some of the numerous cases that were referred to, for the purpose of showing that, from *Jackson v. Innes* down to the latest decision, the Court have always acted upon the same principles; and that, the law being well established, the question

is—as several of the Judges have stated—more one of fact than of law.

I have referred to the power of appointment in the redemption clause, on which a good deal of stress was laid, as if, taken along with other expressions in the deed, it showed an intention to alter the original limitations. But this, it will be found, is a common clause in such instruments, and there is no case, so far I am aware, in which it has been so treated. In *Hipkin v. Wilson* (51), where it was held that there was no intention to alter the limitation, there was such a power of appointment. If, indeed, the mortgage debt had been paid, and Maria McDonnell had exercised the power of appointment, the case might have been different. But no appointment was made. The fact that by the barring of her estate-tail Maria McDonnell got an enlarged estate—that is, an estate in fee-simple—has also been relied on, as showing that the bar was absolute. And if this be the case, then an estate in fee-simple in the lands comprised in Maria McDonnell's estate-tail would, at her death, have devolved upon her father, Thomas Underwood, as her heir-at-law. On this point, I may say that the cases to which I have referred as giving, or appearing to give, to the wife a larger interest than she had before, can scarcely be said to be strictly applicable, and I attach little, if any, weight to them. But I look at the general principles so clearly established by Courts of Equity that, in the case of a mortgage, to alter the limitations of an estate, as they existed before the mortgage, there must be a clear intention to do so, and that no slight expressions or circumstances will be sufficient to produce such an effect.

After the fullest consideration that I could give to this question—considering that the consent of Maria McDonnell was for the purpose of giving a security to the mortgagee; that the operative part of the deed (including the interpretation clause), so far as she was concerned, carries out such her consent and her intentions; and that no uses are declared in the deed, as would, in all probability, have been the case if there had been an intention to alter the original limitation; comparing also the circumstances of this case with the circumstances of the several

(51) 3 Dr. & Sm. 738.

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cases which I have cited, I must say, to use the words of Lord *Cranworth* in *Whitbread v. Smith*, that:—"I am unable to find anything in this transaction from which I can infer that these parties intended to alter." And, "In my opinion they meant nothing more by the redemption clause than that there should be a power of redemption in those persons who should have been lawfully entitled."

The result is that, in my opinion, the estate in fee in the lands, &c., comprised in Maria McDonnell's estate-tail, did not, at her death without issue, pass to her father, Thomas Underwood, as her heir-at-law; but that the estate-tail passed, on her death without issue, to those entitled after her under the limitations of the will of James Underwood, that is, to her surviving brothers and sisters as tenants in common in tail, subject, however, to the mortgage in fee to Rodd. Consequently, so far as Maria McDonnell's estate is concerned, Mr. Plomley, Mr. Rogers, and Mr. Dixon get nothing by their purchase from the official assignee of James Underwood's insolvent estate.

A good deal was said on the question of conversion. But, as it appears to me, that term is not applicable here, as the Act of 1873 did not, in my opinion, effect a conversion in the ordinary meaning of that word—and, in the view I take of the other question argued before us, it is not at present necessary to lay down any rule as to the work of distribution of the proceeds of sale. If it were necessary to do so, I should like to hear argument on the matter. It is sufficient to say that, in my opinion, Rodd's representative will be entitled to payment out of Maria McDonnell's estate, treated, as regards him, as an estate in fee-simple.

On the whole, I am of opinion that the decree, as drawn up *pro formâ*, is correct, except in the last clause, which, I think, ought to be altered, so as to give Rodd's representative a right to contribution out of Maria McDonnell's estate as an estate in fee-simple. The decree accordingly stands as it is. I may add that it appears to me to have been settled by a former decision of the Court that Rodd or his representative had no right to retain possession of the land by virtue of the Statute of Limitation. The decree will be drawn up accordingly. The costs of

the representatives of the tenants in tail are to be paid by Mr. Plomley, Mr. Rogers, and Mr. Dixon. The representative of Mr. Rodd pays his own costs.

On a subsequent day, it being mentioned that the representative of Mr. Rodd had been provided for in the body of the decree, and that consequently no alteration of the decree was necessary, the decree, therefore, will stand as it is.

1887.

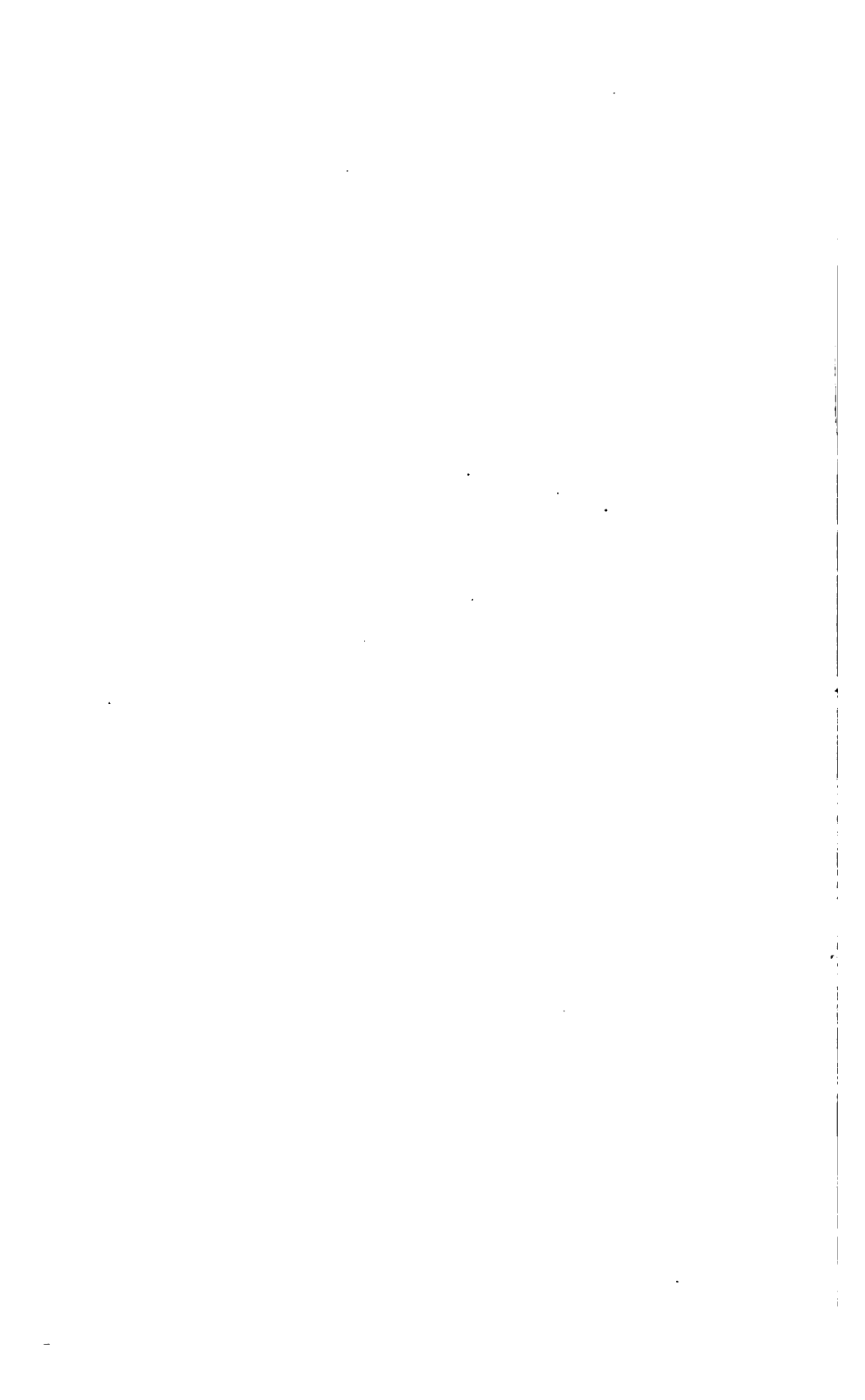
R.
UNDERWOOD
ESTATE ACTS,
IN THE
MATTER OF
FELTON'S
PETITION.
Fawcett J.

Decree accordingly.

Solicitors for the Felton family and James Underwood :
Cope & King.

Solicitor for Messrs. Rogers & Dixon : *L. F. Dixon.*

Solicitors for the Lisson family : *Salter & Barker.*



C A S E S

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN ITS

Divorce and Matrimonial Jurisdiction,

DURING THE YEAR 1887.

DORN v. DORN AND NICHOLSON (1).

1887.

Practice—Stay of proceedings—Costs of previous suit—Alimony—Parties.

May 12.

Where the respondent in a former suit has neglected to pay costs and alimony as ordered by the Court, the Court will not stay proceedings in a suit in which he is petitioner, on the ground that such costs and alimony have not been paid.

Manning, J.

Yetman v. Yetman (21 L.J. P. & M. 647) followed.

THIS was an application by the respondent to stay proceedings on the ground that the costs of a previous suit for judicial separation and custody of the children, in which the present respondent, the wife, had been successful, had not been paid by the present petitioner. There had also been default in the payment of alimony by the petitioner, and he had been for a very long time imprisoned for contempt of Court in not paying the said alimony.

Ralston in support of the application. The Court will refuse to hear Dorn until he has purged the contempt of which he has been guilty in not paying the alimony as ordered, or at any rate until he has paid the costs of the former suit. Though Nicholson was not strictly a party to that suit, yet the charge now made against him was fully gone into on that occasion by Dorn as a ground of defence, and as a ground for the custody of the children being given to him. He relies on the following authorities:—*Browne on Divorce*, p. 377; *Divorce Amendment N.S.W.R.*, Vol. VIII., D.

1887. *Act of 1885, s. 8; Peters v. Tilley (1); Jago v. Jago and Graham (2); Stoot v. Stoot (3); Garston v. Garston (4); Cavendish v. Cavendish (5); Curtis v. Curtis (6); Ex parte Guest (7); Gould v. Twine (8).*

DORN
v.
DORN
and
NICHOLSON.

Moriarty contra. It is only when the suit in which the costs have been incurred is the same suit which the party who has not paid those costs is desirous of prosecuting that the Court will interfere to stay proceedings. This is an entirely different suit to the one in which Dorn has not paid the costs. He refers to *Yetman v. Yetman (9)*.

Ralston in reply.

Manning, J. SIR W. M. MANNING, J. I have examined very fully a mass of affidavits in this case and in the earlier case by the wife; and I refuse to stay proceedings in this suit. I quite concur in the decision in the case of *Yetman v. Yetman*; and in that case the facts were almost the same as those at present before me. The application must be dismissed with costs.

Solicitor for respondent (applicant): *Wilkinson*.

Solicitor for petitioner: *Dunn*.

June 2.

DORN v. DORN AND NICHOLSON (2).

Practice—Appearance under protest—Appeal on point of law pending—Pleadings not complete—Issues settled and mode of trial fixed.

Manning

The Court will settle issues and fix the mode of trial, even where an appeal is pending against an order made in the suit, which appeal, if successful, would render the trial unnecessary, and though the pleadings in the suit are, at the time of making the application, not complete.

Moriarty, for the petitioner, moved to settle issues and fix the mode of trial.

Ralston opposed the motion on the following grounds:—(1) We have appeared under protest, and have not yet filed our answer; so the pleadings are not complete, and the motion is premature. (2) We are appealing from an order made in this

(1) L.R. 11 P.D. 145.

(2) 3 Sw. & Tr. 103.

(3) 30 L.J. P. & M. 108.

(4) 34 L.J. P. & M. 45.

(5) 15 W.R. 182.

(6) 5 Moo. P.C. 252.

(7) 1 S.C.R. N.S. 129.

(8) 22 W.R. 398.

(9) 21 L.J. 647

suit on a point of law, and the Court will not proceed to try the facts of the case when a decision in our favour in the Court above would render the trial unnecessary and futile. He cites *Wilson v. Church* (10).

1887.

DOEN
v.
DOEN
and
NICHOLSON.

Moriarty, in reply, cites *In re Palmer's application* (11).

SIR W. MANNING, J., decided that he could settle the issues and fix the mode of trial, and ordered accordingly.

Solicitor for petitioner : *Dunn*.

Solicitor for respondent : *Wilkinson*.

[NOTE.—The order appealed from will be found reported above.]

McGARRY v. McGARRY AND PIKE.

May 31.
June 1.

Practice—No answer filed by co-respondent—Right to strike jurors—Effect on non-appearance on question of damages.

Darley, C.J.

Where a co-respondent has not entered an appearance, or filed an answer, he is still entitled to strike jurors.

The jury is bound to find some damages against a co-respondent who has not filed an answer to the petition, even though they find that the respondent has not committed adultery.

Sly for the petitioner.

Ralston for the respondent.

THIS was a suit brought by the husband for dissolution of marriage on the ground of his wife's adultery with the co-respondent. The respondent filed an answer denying the alleged adultery ; but the co-respondent neither entered an appearance nor filed an answer. When the case was called on, his Honour directed him to be called outside the Court, and he, having been subpoenaed by the respondent as a witness, came into Court. Notwithstanding the fact that the co-respondent had not appeared to the suit, he was told by his Honour the *Chief Justice* that he was entitled to strike six jurors. Section 5 of the *Matrimonial Causes Act Amendment Act* (48 Vic. No. 3) provides for the summoning and striking of jurors in case of all parties appearing, but makes no provision to meet the case of any party or parties to the suit not appearing.

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McGARRY
v.
McGARRY
AND
PIKE.

In the course of his summing up his Honour explained to the jury the effect of the co-respondent not having filed an answer, in the following words :—" The effect of the co-respondent not having filed an answer is, that so far as he is concerned you are to treat him as if he were guilty. If you find that Mrs. McGarry did not commit adultery, still, as the co-respondent has filed no defence, you must find some damages against him; you need only find a farthing, but you must find something. I find the law on this point clearly laid down in the case of *Stone v. Stone* (*)."

Solicitor for petitioner : *Fergusson*, for *Davidson* (Goulburn).

Solicitor for respondent : *Pigott*, for *Betts* (Goulburn).

June 1.

EVANS v. BRENTON F.C. TREDENNICK.

Manning, J.

Nullity of marriage—Unsound mind—Practice—Decree absolute—48 Vic. No. s. 9.

In certain cases the Court will fix some time less than six months within which to make absolute the decree nisi.

This was a suit for nullity of marriage brought by David Evans, as guardian *ad litem* of John Tredennick, on the ground that John Tredennick was at the date of the alleged marriage with the respondent of unsound mind.

Nash (A. Knox with him) for the petitioner.

The respondent did not appear, though she had filed an answer to the petition, denying the insanity.

The following cases were cited :—*Portsmouth v. Portsmouth* (1), *Hancock v. Peaty* (2), *Turner v. Meyers* (3), *Hunter v. Edney* (4).

Manning, J.

SIR W. MANNING, J. (Acting Judge in Divorce). I am of opinion that this marriage ought to be declared null and void. The authority I prefer to rely on is the case of *Portsmouth v. Portsmouth* (1), with reference especially to the passage in the judgment at p. 372. "A marriage so had wants the essential

(*) 34 L.J. P.M. & A. 40 in *notis*.

(1) 1 Hag. Ec. 355.

(2) L.R. 1 P.D. 340.

(3) 1 Hag. Cons. 414.

(4) L.R. 10 P. D. 93.

ingredient to render the contract valid—the consent of a free and rational agent.” Those words directly apply to this case. The modern view of the contract of marriage, which I adopt, is that if at the time of the ceremony either party is of unsound mind the contract is not binding. I do not say that I should take the same view of the contract of marriage as of an ordinary civil contract. The more serious the undertaking, the more likely the mind is to be capable of understanding the attendant ceremony. I am not disposed to follow the authority cited as to the question whether the mind of the person setting up the ground of insanity was so weak as to be easily acted upon by the exercise of undue influence. The Court of Equity might be induced to set aside a deed on grounds which would not be sufficient to justify this Court in dissolving a marriage. No doubt the whole object of this marriage was to enable the respondent to get hold of all the man’s property, but I do not like introducing the question of fraud into a suit for nullity of marriage. In such a suit the question is not whether the mind of the person seeking to have the marriage annulled was so comparatively weak as to be influenced with a greater or less degree of ease, but whether that person had, in the abstract, sufficient understanding to comprehend the meaning and consequences of the ceremony. I am of opinion that John Tredennick had not that degree of understanding, and I therefore declare the marriage null and void.

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v.
BRENTON
F.C.
TREDENNICK.
Manning, J.

On Thursday, the 9th of June, in obedience to a summons issued by order of his Honour Sir W. *Manning, J.*, directing the parties to attend before him on that date, with a view to fixing some time less than six months on the expiration of which the decree might be made absolute, under sec. 9 of the Act 48 Vic. No. 3,

June 9.

Nash appeared for the petitioner.

The respondent did not appear.

SIR W. MANNING, J. I have made up my mind in this case to fix a shorter time than six months, and I think the time fixed should be very short. If the successful party in this suit were to die before the decree is made absolute, there would be a grave

Manning, J

1887. question as to whether the respondent could not claim, as his wife, that she was entitled to dower out of his estate. The case
EVANS v. BRENTON is one in which I have no doubt as to the *bona fides* of the
F.C. petitioner, and as there are circumstances of fraud on the
TREDENNICK. respondent's part, I have no hesitation in doing my best to
Manning, J. prevent the occurrence of the contingency I have mentioned. I therefore fix the time at six weeks from the date of the decree *nisi*. I may take this opportunity of saying that I think that in all cases where a marriage is dissolved, an official communication of the fact should be made to the Registrar-General.

Solicitors for petitioner : *Allen & Allen*.

IN VICE-ADMIRALTY.

(Before Sir Frederick Darley, C.J., Judge Commissary.)

1887.

March 24.
May 17THE *TYBURNIA* (No. 1).

Wages and disbursements—Priorities of different claimants—Detention money in respect of wages after commencement of action.

When a fund, by the sale of a ship, is placed in Court by one set of claimants so as to be available for other claimants, the former are entitled to their costs up to and including sale, though they do not rank first in respect of their actual claim. Seamen's claims for wages have priority over master's wages and disbursements.

A master is entitled to detention money in respect of wages since the commencement of the action up to taxation of costs.

There were three suits (Nos. 19, 26, and 27) against the ship *Tyburnia*. No. 19 was an action brought by the master of the vessel for the recovery of the amount of wages due to him as such master, and for his disbursements on account of the vessel.

Nos. 26 and 27 were actions brought by seamen of the vessel for the recovery of the respective amounts due to them for wages.

By order of the Court of the 29th of December, in action No. 19, it was referred to the Registrar to take an account of the amount due to the master for his wages and disbursements.

The Registrar accordingly made his report on the 24th of March, as follows:

This case, which is a default cause by Alexander M'Devitt, the master of the *Tyburnia*, for wages and disbursements, was argued before Captain Pockley, Marine Surveyor (who has been appointed by this honourable Court an assessor,) and myself, by Dr. *Sly*, of counsel on behalf of the plaintiff. The facts of the case are as follows:—The plaintiff shipped at New York on board the *Tyburnia* as master, under an agreement in the words and figures following: Port of New York, September 5th, 1885. I do hereby agree with Mr. Somerset, managing owner of the British barque *Tyburnia*, of London, now at the Port of New York, to take command of said vessel, and to proceed to Brisbane, Queensland, as master of said vessel, and render said services for the rate of wages: Twelve pounds sterling per month. I also agree that on arrival of said vessel at Brisbane

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that I am to be relieved of the command of said vessel, and surrender said vessel to a successor appointed by the owners of said vessel. In the event of my not wanting to engage and ship in said vessel as chief mate, that I am to be discharged and paid off at Brisbane at the rate of wages agreed on. (Signed) Alex. M'Devitt, Arthur Somerset. Witness: John Haveron, Notary Public, No. 60, New York County.

Before leaving New York, the plaintiff had delivered to him, by the said managing owner, a letter of instructions in the words and figures following:—"New York, September 4th, 1885. Dear Captain McDevitt,—In the event of your not hearing to the contrary when you arrive at Brisbane, you will get the ship unloaded and loaded again with as little delay as possible, for any port which you may get the charter which, in your opinion, will be of most advantage to the ship. If instructions do not await you there, do not wait for them. I beg that you will take every possible care of the velvet cushions, ornamental fittings, carpets, &c., of the cabin. There are velvet cushions of inferior quality, which belonged to the cabins, between decks, which could be used during the voyage. It is highly probable that the ship will be used again for passengers, and the condition of the cushions, bedding, curtains, linen, etc., will be of great importance. If you get a good offer for the steam launch at Brisbane, you could accept it, as she must be deteriorating. She cost us 100*l*, and ought to be worth considerably more there. If you have to show her off, it will be well to have an experienced man to see to the engine, and make sure of her performing well. I beg also that you will be extremely careful of the wines and spirits under your charge. There is some rum in a cask, and more in a wicker bottle. I think it would be best to *seal* the spirit room up, and only open it when necessary. The tar-heel tobacco in the spirit room is expensive. I hope you will have a safe and speedy voyage. Yours faithfully, Arthur Somerset. P.S.—Please be particular in seeing that the landing certificates of the 31 cases of safes be returned to Messrs. A. D. Strauss, 15 Broadway—properly attested; also of the 14 cases of corkscrews to Messrs. R. W. Forbes. My address which will always find me is Frimley, Surrey, England."

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The *Tyburnia*, with the plaintiff as master, left New York on the 6th of September, 1885, bound for Brisbane with a general cargo. But the plaintiff was compelled to take the vessel into Pernambuco for provisions, and to have the ship's chronometer repaired. Messrs. Johnson, Pater and Co. acted there as the agents of the ship. The disbursements, &c., there for the vessel came to 120*l.* 9*s.* 7*d.* For this amount the plaintiff drew on the managing owners of the ship by two bills of exchange. Both of these were dishonoured when presented for acceptance. The *Tyburnia*, with plaintiff as her master, arrived at Brisbane on the 6th of January, 1886. Messrs. Webster and Co. there acted as the agents of the ship.

The disbursements at Brisbane came to 604*l.* 16*s.* 6*d.* Webster and Co. received 450*l.* for the freight as per charter party, leaving a balance of 154*l.* 4*s.* To clear this liability the plaintiff left with them the ship's launch and her stock of wines and spirits. These were duly sold, and thereby reduced the amount due to them to 2*l.* 7*s.* 7*d.* The ship, with the plaintiff as master, arrived at Newcastle on 4th March, 1886. She has been lying there ever since, and is now under arrest in this and two other suits for wages.

I have, in the schedule to this report, set forth the several amounts claimed by and allowed to the plaintiff for wages and disbursements. All these claims have been investigated, and the various accounts filed in reference thereto, carefully examined by the assessor and myself. The plaintiff was examined in support of his claim before myself on the 11th January last, and again on the 9th instant before the assessor and myself. As to the greater number of the items for disbursements, the plaintiff, on the accounts rendered, as well as the owners of the ship, is charged as personally liable, and in respect of others, the accounts are made out simply as against the owners or against the ship. Plaintiff, however, when examined before me, stated that he was personally liable in respect of all the items, and that he had never disputed it. Inasmuch as the practice of the Court in such cases is to direct the proceeds of sale of the vessel to be paid into the Registry, and to be there retained until actual payment of the ship's liabilities has been produced to the

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Registrar, I did not deem it necessary to call for further evidence as to the plaintiff's personal liability. As to whether or not liabilities incurred by the master of a ship are "disbursements," I respectfully draw the Court's attention to the following cases: *Marco Polo* (24 L.T. (N.S.) 804), *The Underwriter* (25 L.T. (N.S.) 279), *The Fairport* (8 L.R. P.D. 48), *The Beeswing* (5 Aspinnall's M.C. 484). The opinion of the Court is respectfully requested as to whether on the taxation of the plaintiff's costs in this suit, I can properly allow him as detention money in respect of wages which have accrued due since the commencement of this action, and if so, for what period of time—whether up to decree being pronounced, or up to the time of taxation of the plaintiff's costs? See *The Carolina* (34 L.T. N.S. 399).

The schedule showed:—1. Wages, 5th September, 1885, to 21st October, 1886, at 12*l.*, less 10*l.* 13*s.* 11*d.*; cash received, 151*l.* 13*s.* 11*d.* 2. Pernambuco: Disbursements, 120*l.* 9*s.* 7*d.* 3. Brisbane: Disbursements, 604*l.* 16*s.* 6*d.* 4. Newcastle: Disbursements, 519*l.* 17*s.* 2*d.*; making a total of 1406*l.* Deduct, for freight received by Webster and Co., 450*l.* 12*s.* 6*d.*; proceeds of sale of ship's launch, 64*l.* 19*s.* 11*d.*; net proceeds of sale of ship's wines and spirits, 86*l.* 16*s.* 6*d.*—making 602*l.* 8*s.* 11*d.*; leaving a balance due to the plaintiff of 804*l.* 8*s.* 3*d.*

March 26. On the 26th March,

R. M. Sly moved for an order for the appraisement and sale of the ship on the ground that the Registrar had found that 804*l.* 8*s.* 3*d.* was due to the master for wages and disbursements, and that two other judgments had been given against the ship at the instance of the chief mate and the steward. There was an affidavit that the ship was suffering from deterioration and that some persons were enquiring when she was to be sold.

SIR FREDERICK DARLEY, C.J. (JUDGE COMMISSARY), made an order for the appraisement and the sale of the vessel, and reserved all for questions as to priority of payments till the money was brought into Court.

Sly then moved on the report of the Registrar for a decree

for the amount due to Captain McDevitt for wages and disbursements.

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SIR FREDERICK DARLEY (Judge Commissary). I have read the report, which goes very fully into the matter. It appears to me that the conclusions that are drawn by the Registrar are correct. There are two matters left for the direction of the Court. The first is: Up to what time is the master entitled to detention money? In the case of *The Carolina* (34 Law Times, N.S. 399), it was held that the master was entitled to detention money up to decree. It appears to me, however, that he is entitled up to the taxation of the costs. Of course the taxation should be proceeded with as speedily as possible. He is entitled to stay here to protect his interests. It was so held in *Brasyer v. Maclean*, where the plaintiff, who had obtained a verdict, was detained here pending the result of a new trial motion which was ultimately refused. In that case it was decided that the plaintiff was entitled to remain here to protect his own interests, and was allowed his expenses on taxation. The same was held in *Harvey v. Ewan* (2 N.S.W.L.R. 267), where the plaintiff, the master of a ship, brought an action for wrongful dismissal. The Prothonotary's taxation was reviewed, and it was held that he was right in allowing the master expenses of waiting here until his case was finally decided. I am, therefore, of opinion that the Registrar may allow the master a sum for detention money up to the time of taxation. I am aware I am going farther than was done in the case in the 34 Law Times, but I think I am furthering the same principle. The second matter is that of disbursements. I have looked into the authorities which have been supplied to me by the Registrar, and it appears to me that the decree should embrace disbursements. That is, of course, as to amounts actually paid; but in respect of liabilities I will direct the money be paid into Court, and it will be for the Court to hand over that money. The master will be entitled to receive his wages and detention money, and also moneys that he has actually paid away.

Sly. I would suggest that the Registrar should send notice to the creditors.

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[The JUDGE COMMISSARY. Of course the master is liable, but the Court will discharge that liability for him. I make a decree for 804*l.* 8*s.* 3*d.* and costs, which the master will be entitled to receive out of the fund.]

The vessel having been sold, by order of the Court, on the 20th day of April, and the gross proceeds paid into the Registry in action No. 19, it was, by order of the Court made in that suit, referred to the Registrar to report as to the priorities of the claimants on the three suits.

The Registrar having accordingly made his report and the suit No. 19 coming on for trial, and Dr. *Sly*, of counsel for the plaintiff, having moved that such report should be confirmed, and the same having been confirmed by the Court, an order was made to pay money out of Court in pursuance of such report, as follows:—No. 19—105*l.* 14*s.* 10*d.* due for costs up to and inclusive of sale, and 18*s.* 8*d.* balance in Court after payment in Nos. 26 and 27; also 220*l.* Marshal's costs. No. 26—167*l.* 13*s.* 10*d.* debt and costs, and 1*l.* 10*s.* Marshal's costs. No. 27—142*l.* 3*s.* 8*d.* debt and costs, and 1*l.* 10*s.* Marshal's fees.

It was decreed that the sum of 88*l.* 11*s.* was due to the plaintiff in respect of his claim for wages, together with his costs of suit up to and including the sale of the ship, and that such costs should include the attendance of the plaintiff as a witness at the trial, up to the time of taxation.

The Registrar's report was as follows:—As directed by the order of this Court of the 7th day of May instant, to report to the Court as to the priorities of the respective claims in this suit, and in the suits No. 26 and 27 against the proceeds of sale of the ship *Tyburnia*, I have been attended by Messrs. *Stephen, Laurence & Jaques*, solicitors on behalf of the plaintiff, and by Dr. *George Sly*, solicitor on behalf of the plaintiffs in the said suits Nos. 26 and 27; and the matter having been debated before me, and having given full consideration to the question, I beg respectfully to report to the Court that after payment out of the sum of 639*l.* 18*s.* 6*d.*, the amount of the gross proceeds of sale of the *Tyburnia* are the amount of the purchase money of 700*l.*, for which the vessel was sold, after deducting the auctioneers' and Marshal's charges, the priorities of the said

claimants on the residue of the fund in Court are as follows:—

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1. No. 19—Costs of suit, to be taxed up to and including sale to be paid in full.

2. Nos. 26 and 27—Debts and costs of suit to be taxed and paid in full.

3. Balance of costs in this suit to be taxed and paid in full.

4. Wages and detention money of the claimant in Bristol to be paid in full, if residue of fund sufficient.

5. The disbursements of the claimant in this suit to be paid ratably out of the residue (if any) of the fund in Court.

I have, in the schedule hereto, set forth the authorities upon which I base this my report. I should state that various claimants for necessities supplied to the ship, which have been allowed for the plaintiff's claim in this suit for disbursements, have not been represented before me, and that I have come to the conclusion without argument, that the plaintiff's claim in this suit for his wages ranks prior to the right of the said claimants for the said necessities supplied.

Schedule—1. When there are several claimants against proceeds of a vessel in the registry, and she has been sold at the suit of one, the cost of such sale will be paid before all claims, as such sale was for the benefit of all: *The Panthea* (25 L.T. N.S. 389). When a fund, by a sale of ship, is placed in Court by one set of claimants, so as to be available for other claimants, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim. Mariners have priority for wages over persons with a possessory common law lien up to the time of the beginning of such suit, and they are entitled to subsistence money from the time they leave the ship to the time they return home. This and the expenses of the journey home, and the cost of the action rank with their prior wages: *The Immacolata Concezione* (9 L.R. P.D. 37), *Williams & Bruce's A.P.* 468.

2. In rival claims against proceeds of ship, seamen's wages are preferred to master's wages and disbursements: *The Salacia* (Lushington, 545).

The *Merchant Shipping Act*, 1854, applies to the colonies; and by the 191st section, a master has a lien for his wages in the

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Vice-Admiralty Court, whatever may be the municipal law of the colony: *The Rajah of Cochin* (Swabey 473).

This Report was also confirmed by his Honour the Judge Commissary.

Solicitors for plaintiff in No. 19: *Stephen, Laurence & Jaques*.

Solicitor for plaintiffs in Nos. 26 and 27: *G. J. Sly*.

May 16.

THE TYBURNIA (No. 2).

Taxation—Marshal's fees and disbursements—Executing decree of sale—Preparing conditions of sale—Possession money when ship arrested in another suit.

The Marshal is not entitled to a fee for executing the decree of sale in addition to a fee for executing a decree of appraisement.

When the circumstances are such that a prudent vendor would naturally protect his interests by carefully prepared conditions of sale, the Marshal may be allowed the costs (to be settled by the Registrar) of such preparation.

Where a ship, already under arrest, and in the possession of the Marshal, is arrested in a second suit, no fees for possession in respect of the second suit can be allowed.

The fees and disbursements of the Marshal in the suit *McDevitt v. The ship Tyburnia* (No. 19), amounting to 221*l.* 7*s.* 6*d.*, were submitted to the Registrar for taxation of the fees. The Registrar allowed the item 1*l.* for executing decree of appraisement, but disallowed 1*l.* for executing decree of sale. Of the disbursements, the Registrar disallowed the item 2*l.* 2*s.* for drawing and engrossing conditions of sale.

In the suit *Hughes v. The ship Tyburnia* (No. 27), the following was the list of the Marshal's fees and disbursements:—Executing warrant at Newcastle, 1*l.*; decree, 10*s.*; possession fee, 96 days at 2*s.* 6*d.* per day, 12*l.* The Registrar disallowed the last item on the ground that, in the suit No. 19, a possession fee, 195 days at 2*s.* 6*d.* per day, amounting to 241*l.* 7*s.* 6*d.*, had been allowed.

The Marshal applied for a review of the Registrar's decision.

SIR FREDERICK DARLEY, C.J. (JUDGE COMMISSARY.) In this matter three different items come before me for review—First,

the sum of 1*l.* 1*s.* charged upon the decree for sale ; secondly, the sum of 2*l.* 2*s.*, being a disbursement paid for preparing conditions of sale ; and thirdly, several sums charged for keeping possession of the ship in other suits than that in which she was arrested and first taken into the possession of the Marshal. As to the first, I think this has been rightly disallowed by the Registrar. The table of fees only provides one fee for executing any commission of appraisement and sale, and the Registrar has acted in accordance with such table of fees. Second, I think the Marshal may be allowed the costs (such costs as to amount to be settled by the Registrar) of the preparation of conditions of sale. I do not mean to say that in every case such a disbursement should be allowed, but the circumstances surrounding the sale of this ship were such that any prudent vendor would naturally protect his interest by carefully-prepared conditions of sale. Third, the fees for holding possession in all suits after the first were, in my opinion, properly disallowed. This matter has, it appears, been already determined in the case of the *Ohandong*a, 5th November, 1880, when the Deputy Judge, after consultation, as I understand, with the late Judge, Sir James *Martin*, Chief Justice, disallowed a similar claim. In my opinion, that case was rightly decided. When a ship is under arrest, she is in the possession of the Marshal, and requires no further care until an order of the Court takes her out of his possession ; then, if arrested in a second suit, such arrest in no way interferes with the previous possession. I think the note to be found at page 90 of the Vice-Admiralty Court Rules, ed. 1883, is really conclusive upon this point, from which it appears that no fee for possession is allowed for property under arrest, if such property be then in the custody of an authorised person. Here the ship is, by virtue of the arrest, already in the possession of the Marshal, and is therefore in the custody of an authorised person. It is said, and, indeed, proved, that these fees were charged and allowed to Mr. Teale, the present Marshal's predecessor ; but the Marshal (as is said in the case of the *Bendsburg*, 6 Chr. Robinson, at page 162) " cannot set up his own practice or even the unsanctioned practice of a predecessor as any authority in such a matter." No case has been cited in which such a claim

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1887. is sanctioned, and it is, in my opinion, opposed to sound reason and to the necessity of the case. For these reasons I think the Registrar was right in disallowing the items coming under this branch. The application is therefore granted as to the disbursement in respect of the conditions of sale, and refused as to the other matters brought before me. No costs.

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April 21.

STOKES AND OTHERS v. THE CONFERENCE.

Shipping—Vice-Admiralty jurisdiction—Necessaries—26 Vic. cap. 24, s. 10—Premium on policy of insurance.

The insurance of a ship is not a necessary within the meaning of 26 Vic. cap. 24, s. 10. *The Heinrich Bjorn* (L.R. 8 P.D. 151) followed.

On the 26th October, 1886, the plaintiffs issued a writ claiming 220*l.* for insurance of the ship *Conference*. On the 3rd November appearance (under protest) was entered for J. T. Peacock, as mortgagee in possession. The ship having been arrested in Port Jackson on the 14th April, 1887, the mortgagee served the plaintiff with notice of motion for an order to set aside the writ, and for leave to intervene.

C. J. Manning, for the mortgagee, in support of the motion.

Sly for the plaintiffs.

SIR FREDERICK DARLEY, C.J. (JUDGE COMMISSARY). This is a motion on behalf of the mortgagee of the ship, to set aside a writ issued herein with costs, and for liberty to the mortgagee to intervene, on the grounds :—First : That the mortgagee was in possession of the ship at the time of the issue of the writ, and that the contract was made before taking possession, and was not made with the mortgagee. Secondly : That the claim set up was not in respect of necessaries. The second point was the only matter argued before me, it being conceded that the first point raises a

question of fact which can only be properly determined at the hearing of the suit. This action was to recover the sum of 220*l.* 4*s.* 3*d.* paid by the plaintiff as agent, and at the request of the owner of the ship, who had left the colony, in respect of a premium of insurance upon the vessel and upon her freight, and the question raised for my determination is whether the plaintiff can recover this amount as against the ship. It has been contended for the plaintiff that this is a claim for necessities supplied to the ship, and that therefore the Vice-Admiralty Court has jurisdiction under sub-clause 10 of section 10 of 26 Victoria, chap. 24; while it has been contended on behalf of the mortgagee that the insurance was not a necessary within the meaning of the section, and therefore the Court has no jurisdiction. In support of the plaintiff's contention, the case of *The Riga* (1) has been cited. In that case *Sir Robert Phillimore* held that there was no distinction between necessities for the ship and necessities for the voyage; and professed to follow the authority of *Lord Tenterden* in the case of *Webster v. Seekamp* (2), deciding that insurance for freight was a necessary within the meaning of 3 and 4 Vic. chap. 65, sec. 6, the words of the statute being in this respect practically the same as 26 Vic. chap. 24, sec. 10. I confess that I am unable to understand *Sir Robert Phillimore's* judgment. He professed to follow *Webster v. Seekamp* (2), and it is therefore important to examine that case. It was an action at common law by brassfounders against the owner to recover the sum of their bill for coppering the ship, which work had been ordered by the master; and the question arose whether the copper was necessary to the ship engaged in the trade in which this vessel was then engaged, it being contended that, although copper might be useful, it was not absolutely necessary, and that the master could only bind his owners by an order for what was absolutely necessary. The Judge at the trial left it to the jury to say whether the coppering was useful and proper for a vessel about to proceed to the Mediterranean, and whether it was such as a prudent owner himself, if present, would have ordered. *Lord Tenterden* (then *Abbott, C.J.*) said: "It was contended at the trial that the liability of the owners

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(1) L.R. 3 Ad. & Ec. 516.

(2) 4 B. & Ald. 352.

1887. was confined to what was *absolutely* necessary. I think that
 STOKES rule too narrow, for it would be extremely difficult to decide, and
 v. even impossible in many cases, what is *absolutely* necessary. If,
 THE CONFERENCE. however, the jury are to enquire only what is necessary, there is
 Darley C.J. no better rule to ascertain that than by considering what a
 prudent man, if present, would do under the circumstances in
 which the agent, in his absence, is called upon to act. I
 am of opinion that whatever is fit and proper for the service in
 which the vessel is engaged, whatever the owner of that vessel,
 as a prudent man, would have ordered, if present at the time,
 comes within the meaning of the term 'necessary,' as applied to
 those repairs done or things provided for the ship by order of
 the master for which the owners are liable." Now the only
 matter dealt with was something supplied to the ship herself, and
 Lord *Tenterden's* judgment was expressly confined to this.
 Relying on that judgment, and purporting to apply the prin-
 ciple of law there laid down, *Sir Robert Phillimore* held that
 insurance on the freight of the ship was necessary. It will be
 observed, however, that no word uttered by Lord *Tenterden*
 sanctioned such a decision. Where he spoke of what a prudent
 owner would do, he had in his mind "the repairs done and
 things provided for the ship," and nothing else. If, then, the
 case of *The Riga* (1) stood alone, I should feel it my duty to
 decline to follow such an application of the law. I am fully
 aware that since the decision in *Webster v. Seekamp* (2), money
 advanced to enable the master to purchase necessities had been
 held recoverable as against the ship, *The Onni* (3), but in such
 a case the necessities must be repairs done to, or things pro-
 vided for the equipment of the ship. (See *Abbott on Shipping*,
 11th edition, 124.) However, since the decision in the case of
The Riga (1), the case of the *Heinrich Bjorn* (4) has been deter-
 mined. It was there expressly held by *Sir James Hannen* that
 premiums of insurance could not be regarded as necessities;
 that the expression "necessaries supplied" must still be confined
 to things directly belonging to the ship's equipment; that the
 insurance of the vessel was something quite extraneous to its
 equipment for sea, and that, however prudent it might be for the

(3) Lush. 154.

(4) L.R. 8 P.D. 151.

owner to insure, it was a prudence exercised for his own protection, and not for the requirements of the vessel in the sense in which the word "necessaries" was used in the statute. I have no hesitation in following the judgment in the case of the *Heinrich Bjorn* (4), and I therefore grant the application. that the writ issued, and all proceedings therein taken by the plaintiffs, be set aside, with costs.

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Application granted with costs.

Solicitors for plaintiffs: *McCulloch & McCulloch.*

Solicitors for mortgagee: *Norton & Co.*

C A S E

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

In Lunacy

BEFORE THE PRIMARY JUDGE.

Re JOHN O'DONNELL.

1887.

Incurably insane patient—Pauper—Alleged agreement to sell lands—Conveyance in pursuance by next of kin—Directions to Master-in-Lunacy—Lunacy Act, 1878 (42 Vic. No. 9)—Costs.

June 17.
Manning, P.J.

It was alleged by one J. R., that on the 9th of May, 1859, J. O'D. being seised of certain land agreed to convey the same to him for value. On the 21st of May, 1859, J. O'D. was admitted as a pauper patient into a Government hospital for the insane, and in 1865 was removed to another hospital as incurable. By deed of the 29th of July, 1861, T. O'D., heir-at-law to J. O'D., conveyed the said land to J.R., in pursuance of the alleged agreement, and, as indemnity, gave J.R. a bond for 300*l*. On the 27th of July, 1886, J.R. applied to bring the land under the provisions of the *Real Property Act*, and the Master in Lunacy, on being acquainted with the facts, applied to the Court for advice and directions.

Held, that the Master should take the necessary steps to make the property available for the patient's support, and that the costs should be paid out of the fund provided by 42 Vic. No. 9, s. 140.

THIS matter came before the Court on an application by the Master in Lunacy, for the advice and directions of the Court, under s. 144 of the *Lunacy Act*, 1878. The facts of the case are fully stated in the report, the material parts of which are as follows :—

1. By deed dated the 2nd of May, 1853, John O'Donnell, senr., conveyed to John O'Donnell, junior, the fee simple of certain land in Pitt-street, in the city of Sydney.

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2. On the 21st of May, 1859, John O'Donnell, junior, was admitted into the hospital for the insane, at Gladesville, and remained there as an insane patient till the 19th of December, 1865, when he was removed, as incurable, to the hospital for the insane at Parramatta, where he has remained ever since, up to the present time.

3. By deed dated the 29th of July, 1861, and made between Timothy O'Donnell of the one part, and John Robertson of the other part, after reciting that John O'Donnell had, on the 9th day of May, 1859, contracted to sell the land therein described to John Robertson, and that before signing a conveyance of the same, the said John O'Donnell became, and then was, an insane patient, and that the said Timothy O'Donnell was his heir-at-law and that John Robertson had agreed to pay the purchase-money, to the said Timothy O'Donnell, on receiving a bond of indemnity of even date therewith, the said Timothy O'Donnell conveyed to the said John Robertson, his heirs and assigns, the land therein described, and acknowledged the payment to him, by the said John Robertson of 130*l.*, the purchase money therein mentioned.

4. By a bond dated the 29th of July, 1861, Timothy O'Donnell became bound to John Robertson in the sum of 300*l.*, payable in the event of John O'Donnell ever becoming sane.

5. On the 27th of July, 1886, John Robertson applied to bring the land in question under the provisions of the *Real Property Act*, and in support of his title lodged, *inter alia*, the before mentioned deeds and documents.

6. In support of his title the said John Robertson also lodged a statutory declaration made by him, and dated the 19th of January, 1887, in which he stated that he had been in undisturbed possession of the said land for twenty-four years and upwards.

7. The Master in Lunacy was unaware that John O'Donnell was entitled to any property, until he received from the superintendent of the hospital for the insane at Parramatta, on the 22nd of February, 1887, a letter from the Registrar-General to Dr. Brown, one of the board of visitors at the said hospital, stating that the said John Robertson was applying to bring some

land, in which the said John O'Donnell had some interest, under the *Real Property Act*, and enquiring if the said John O'Donnell was likely ever to recover.

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8. John O'Donnell is a pauper patient in the said hospital; and nothing has been received by the Government of New South Wales for his support and maintenance since his admission into the hospital at Gladesville, on the 21st of May, 1859, and the Master has no funds in hand belonging to the said patient.

9. On the 5th of May, 1887, the Master, as committee of the said patient, under the said Act, caused a caveat to be entered in the Lands Titles Office in his name, on behalf of the said patient, against the said John Robertson's application to bring the land in question under the *Real Property Act*, on the ground that the said John O'Donnell was entitled in fee simple to the said land.

10. Inasmuch as the alleged contract with the said patient, recited in the said indenture, was made, if at all, only twelve days before the admission of the said patient to the hospital for the insane, and inasmuch as the patient has ever since remained an insane patient, and is incurably insane, and inasmuch as the said conveyance was never executed by the patient, or by anyone duly authorised on his behalf, and inasmuch as no possessory title adverse to the said patient has been shown under the *Statute of Limitations*, the Master is desirous of obtaining the order or advice of the Court upon the matters aforesaid, and especially

(1). As to whether the Master should take such proceedings as he may think necessary in support of the caveat lodged by him.

(2). As to whether this Court, under the circumstances aforesaid, should think fit to give authority, under s. 140 of the said Act, to the Master in Lunacy, to pay out of such of the public moneys as have been or may hereafter be appropriated for the purpose of carrying the said Act into execution, the costs of such proceedings, and of or incidental to this application, until the same may be received from, or in the event of the same not being chargeable to, the estate of the said patient.

(3.) As to whether the Master in Lunacy should, in the event of succeeding on the issues raised by such caveat, proceed to

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bring an action of ejectment against the said John Robertson, to obtain possession of the said land, and to render the same available for the past maintenance and benefit of the patient, and for the purpose of defraying the costs of these proceedings, and as to whether the said Master should pay the costs of bringing such action of ejectment out of the moneys so appropriated as aforesaid, until the same be recovered from, or in the event of the same not being chargeable to, the estate of the said patient.

The facts stated above were verified by an affidavit of Henry Edwards, and there was also an affidavit of Dr. Godson, testifying to the insanity of John O'Donnell.

C. J. Manning appeared for the Master in Lunacy.

The application was heard in Chambers, but his Honour delivered judgment in open Court, as follows:—

Manning, P.J. SIR W. M. MANNING, P.J. This is an application by the Master in Lunacy, under s. 144 of the *Lunacy Act*, 1878, for advice as to what course he should pursue with reference to certain property to which one John O'Donnell, at present a patient in the hospital for the insane at Parramatta, appears to have been entitled. The circumstances of the case are as follows.

His Honour then went fully into the circumstances as set out above, and proceeded:—

The facts of this case came to the knowledge of the Master, purely by accident, in this manner. On Robertson's application to bring the land under the provisions of the *Real Property Act*, the officials at the Lands Titles Office, seeing from the deeds lodged there that O'Donnell was insane at the date of the conveyance of the land to Robertson, and apparently knowing that he was still an inmate of an asylum, instead of communicating directly with the Master, instituted an inquiry as to whether the patient was still an incurable lunatic. The medical officer to whom they applied very properly communicated with the Master, and he was thus enabled to lodge a caveat in the Lands Titles Office just in time to prevent a certificate of title being issued to Robertson. Now, I think that the state of things disclosed in this case ought not to be allowed to exist any longer, and that an intimation of this expression of my opinion should be con-

veyed to the Registrar-General. With regard to the present case, I am clearly of opinion that it is the duty of the Master to follow the matter up, and ascertain whether the land in question is still the property of the lunatic. With regard to the claim set up by Robertson of 24 years' undisturbed possession, I need hardly say that under the *Statute of Limitations* time does not run against a person in the position of O'Donnell. I am further of opinion that if the Master succeeds in preventing the registration of Robertson as owner, he should at once commence an action of ejectment against him, and that the costs of all proceedings taken by the Master in support of the caveat, and in bringing an action of ejectment, if necessary, should be paid out of the fund provided by s. 140 of the Act. It strikes me as possible that the reason why the officials at the Lands Titles Office did not communicate with the Master in Lunacy, though fully aware of the lunacy of the transferror, may have been that they did not think it worth while to do so. If that is the true state of the case, some provision ought to be made to prevent the recurrence of anything of the kind.

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Application granted.

Solicitor for applicant: *à'Beckett.*



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COMMON LAW.

AMENDMENT—*Amendment of pleadings on demurrer*—See PLEADING.

ARTICLED CLERK—*Illness—Incomplete service—Fresh articles necessary to complete five years.*] Where an articulated clerk served four years and five months under his articles and was then compelled from ill-health to be absent nearly six months, and returning the day before his articles expired, continued to serve his master, but not under articles, for seven months. *Held*, that the latter period could not be reckoned to make up the requisite period of five years. But leave was granted to enter into fresh articles, under the same or another master, and to serve under such articles to complete the requisite period. *Ex parte MCPHAIL* - - - 168

ASSIGNMENT—*Assignment of estate—Sufficiency of schedules*—See PLEADING.

ATTORNEY AND SOLICITOR—*Costs—Taxation—Costs of making abstracts of title—Alleged agreement for specified sum—Jurisdiction of master on taxation—Action by solicitor—Jurisdiction of Court to stay proceedings.*] On taxation of a solicitor's bill of cost for 65*l.* for making certain abstracts of title, the Master holding that the solicitor had agreed to do the work for a specified sum for each abstract, taxed the bill down accordingly to 16*l.* 14*s.*, which, after deducting the costs of taxation, left 1*l.* 12*s.* 10*d.* Thereupon, the solicitor, M., commenced an action at law against his client, to recover 65*l.*, and refused to give up the deeds. *Held*, that M. was in error in suing for the 65*l.*, and that his proper course was to have applied to the Primary Judge in Equity for a review of taxation: ordered that the action be stayed and the deeds brought into Court pending an application for review. *Ex parte HARPER; In re McCULLOCH* - - - 167

2. — *Misconduct — Misappropriation of client's money—Exercise of summary jurisdiction of the Court to strike off the rolls.*] Where an attorney has received money to the use of his client, and has not accounted for it, he is liable to be struck off the rolls. The fact that in the ordinary course of his business he paid the money into his banking account, and was unable, through monetary difficulties, to draw it out when it was required, is not a sufficient explanation. Nor is it enough that he has

actually paid it before the rule comes on for argument. *In re D. B. WALKER, Ex parte KEMP; SAME, Ex parte BOTTRELL* - 171

3. — *Misconduct — Practice where charge may amount to criminal offence—Reference to Attorney-General—No criminal proceedings taken—Inquiry by Supreme Court—Attorney censured and ordered to pay costs—Contract to do work for a specific sum.*] A firm of tailors, having bought 200 acres of land in a remote mountainous district for 200*l.*, issued circulars, falsely alleging that certain prize-drawings had taken place, and informing each person, to whom they addressed, that he was the "lucky winner" of a block of the said land, consisting of one-tenth of an acre. The circular continued:—"As deeds for freehold blocks cost in a regular way about 5*l.* 3*s.*, we have made a contract with our solicitor to complete deeds, abstract of title, registration stamp, &c., for the sum of 3*l.* 3*s.*" L. was the solicitor referred to, and in fact agreed to charge, and only received, 1*l.* 4*s.* for each conveyance, &c., of which 1529 had been registered. Upon affidavits setting out the above facts, and alleging that several persons who had taken those conveyances had been unable to identify their land, a rule was granted, on the application of the Incorporated Law Society, calling upon L. to answer the charges contained in the said affidavits. *Held*, that, inasmuch as the charge might amount to an indictable offence, the proper course was to allow the matter to stand over generally in order to see whether criminal proceedings would be instituted by the Attorney-General.

The Attorney-General having declined to prosecute, the matter was again brought before the Court in a subsequent term. *Held* (per FAUCHETT and INNES, JJ.), that L.'s conduct was highly reprehensible, but not deserving of greater punishment than the severe censure of the Court and payment of costs. Per the CHIEF JUSTICE:—"If L. had been from the first cognisant of and a participator in the fraud, he ought to be removed from the roll. Under all the circumstances of the case, he was of opinion that L. should be suspended from the practice of his profession for six months. Per FAUCHETT, J.:—"There was nothing wrong in L., as a solicitor, making a contract to do work for a specific sum, as the reasonableness of the contract could be determined on taxation. *In re LEWIS LEVY* - - - 187

4.—*Misconduct—Inquiry postponed for civil action to be brought—Refusal to deliver up deeds—Dishonesty—Struck off roll.*] K., a solicitor, being ordered to answer affidavits charging him with refusing to deliver up to a client a certain mortgage deed, swore that no such deed was ever prepared by him. The Court ordered the matter to stand over until this and other questions of fact in dispute should be settled in an action at law at the suit of the client. In the meantime an instrument of mortgage signed by K.'s client, and by K. as attesting witness, having been produced in certain Police Court proceedings, was sent to the Prothonotary, and laid before the Court. K., being called upon for an explanation, merely stated through his counsel that, owing to his business having fallen into neglect through domestic bereavement, he had forgotten all about it. *Held*, that K. must be struck off the roll. Order accordingly. *In re KERRIGAN* 365

5.—*Attorneys Costs Act (11 Vic. No. 33), s. 13—Unauthorised person drawing a conveyance—Contempt of Court—Punishment.*] K. was called upon to shew cause why he should not be deemed guilty of and punished for contempt of Court, "for that he, not being a barrister, attorney, or solicitor, &c. . . . did, in expectation of fee, gain, or reward, and in violation of the Act 11 Vic. No. 33, draw or prepare a certain conveyance relating to certain real estate." It appeared that K., an auctioneer's clerk, had, for a fee of 30s., prepared a conveyance, the formal parts of which were printed, of certain land sold at auction by his employers to one B., who afterwards being about to sell the land, found that the conveyance was imperfect and did not disclose a good title. K. filed an affidavit admitting that he had been guilty of contempt, and expressing his regret for having in ignorance infringed the Act; and stating that the land in question belonged to his mother, and that he had the forms printed for his own private use in his own family transactions. *Held*, that K. must pay a fine of 10l., and also a sum of 10l. towards the costs of the Law Institute. *In re KING, Ex parte INCORPORATED LAW INSTITUTE* 395

6.—*Attorneys Costs Act (11 Vic. No. 33), s. 14—Certificated conveyancer—Alleged misconduct—Summary jurisdiction of the Court—Costs.*] The Court has jurisdiction to deal summarily with certificated conveyancers for professional misconduct. This summary jurisdiction will only be exercised in the clearest cases of misconduct; it is not enough to show that a professional man has, by his negligence, made himself civilly responsible. L., a certificated conveyancer, uplifted certain deeds, with his client's authority, from the bank, where they were deposited, as L. was told, and always believed, for safe custody only. L., however, gave a receipt for the deeds, with the words "returnable on demand"

added. After the deeds had been allowed to remain with him for five months, he handed them over to a mortgagee, to whom, and in accordance with his client's instructions, he had prepared a mortgage of the land to which the deeds referred. Subsequently the bank demanded the return of the deeds. L. explained how he came to part with the deeds, and said that, as he had always been informed that the deeds had been deposited with the bank for safe custody only, and not by way of security, he had forgotten that the receipt contained the words "returnable on demand." The bank commenced a suit in Equity against L., and afterwards obtained a rule calling upon L. to show cause why he should not deliver up the deeds, and answer certain affidavits. *Held*, that though L. might be civilly responsible, the bank had not made out a case of misconduct which the Court could deal with summarily. If L.'s explanation, which he had made in a letter to the bank, and afterwards in his statement of defence in Equity, had been, as it ought in fairness to have been, referred to in the affidavits upon which the rule nisi was obtained, that rule would not have been granted. Therefore, the rule was discharged with costs. *Per FAUCETT, J.* As a case of negligence had been made out, the rule ought to be discharged without costs. *In re LEWIS, Ex parte THE AUSTRALIAN JOINT STOCK BANK* 181

7.—*Privileged communication between attorney and client—See EVIDENCE.*

BANK—Indorsement of bill of lading by—See BILL OF LADING.

BILL OF EXCHANGE—Notice of dishonour—Indorsee against indorser—Subsequent action by indorsee (holder) upon original consideration—Laches—Payment—Estoppel.] The plaintiffs sold goods to the defendant to the amount of 13l. 16s. 11d., and to the defendant's son to the amount of 68l. The defendant's son thereupon made a promissory note in favour of the defendant for 81l. 16s. 11d., which the defendant indorsed to the plaintiffs. The note was dishonoured at maturity, and the plaintiffs, who were then the holders, sued the defendant on the note in a District Court, and recovered a verdict, which was set aside on appeal on the ground that the defendant had not received due notice of dishonour. The plaintiffs thereupon sued to recover 13l. 16s. 11d., the price of the goods sold to the defendant. *Held* (reversing the decision of the District Court Judge), that the laches of the plaintiffs in not giving the defendant due notice of dishonour, operated so as to make the note equivalent to payment as between the plaintiffs and the defendant; and that therefore the plaintiffs were not entitled to fall back and sue upon the original consideration. *FURNER v. M'CAINE* 209

BILL OF LADING—*Customs Regulation Act* (42 Vic. No. 19), ss. 44–49—*Delivery into lighters—Indorsement of bill of lading—Union Bank Act* (11 Vic.)] The indorsee of a bill of lading sought to have the goods delivered into lighters. The bill of lading provided only to have the goods delivered at a wharf in Sydney, and the sections of 42 Vic. No. 19, which provide for special delivery, had not been complied with. A general form of entry only had been used; the form containing the name of a wharf and the words "to be lightered." The bill of lading was indorsed in blank by the consignor, and subsequently was indorsed in blank by a clerk of the Union Bank, Sydney, on behalf of the bank. The *Union Bank Act*, 11 Vic., enacts that all contracts, assignments, &c., to be effectual must be made by the inspector, for the time being, of the bank. The *Companies Act*, s. 79, provides that bills of exchange and promissory notes only, may be indorsed by any person acting on behalf of the company. *Held*, that the defendant was not bound to deliver the goods into lighters. *Held*, also (FAUCETT, J., dissenting), that the indorsement by the bank not having been made by the inspector, was not an assignment by the bank, and did not pass the property in the bill of lading. *STEWART v. DOHERTY*. 485

BILL OF SALE—*Bill of sale over furniture allowed to insolvent (grantor) by creditors—See INSOLVENCY; and see EVIDENCE.*

BY-LAW—*Construction—Public Vehicles Regulation Act* (36 Vic. No. 14), ss. 15, 16—*Metropolitan Transit Commissioners' by-laws—By-law 28—Cab standing longer than necessary for taking up or setting down passengers—Cabman engaged by the day not plying for hire.*] A cabman, who is engaged by the day, and is waiting for his fare, cannot be prosecuted under by-law 28 of the Metropolitan Transit Commissioners' by-laws for "permitting his cab to stand, &c.," in the street; as he is not plying for hire. *Quære*, whether a cabman may, though engaged, be charged with causing an obstruction in the street under the same by-law. *Ex parte CRIBB*. 400

And see MUNICIPALITIES.

CERTIFICATED CONVEYANCER — *See ATTORNEY AND SOLICITOR, 6.*

CERTIORARI—*Removal of cause from District Court—Difference of opinion of District Court Judges—Balance of convenience—Expense.*] The Court will not remove by *certiorari* from the Metropolitan District Court to the Supreme Court, in a cause, properly triable in the District Court, merely because the two Metropolitan District Court Judges differ in opinion as to the point of law involved. *FOX v. ASHWIN* (1) 392

COMPANY—*Action for calls—Plea of alleged misrepresentation by directors that the calls*

would be devoted to a certain purpose—No allegation of fraud—No repudiation of shares.] To an action for calls on shares in a limited company, the defendant, a shareholder, pleaded that the plaintiff company, in order to induce him to buy the shares of one H., represented to the defendant that if he would purchase H.'s shares the call then due and all future calls would be applied for the purpose of developing the property; and the plea went on to aver that the said calls sued for were made by the directors for the purpose of reducing their indebtedness, and that nothing would be left for the development of the property, and the defendant's shares would become wholly useless to him. *Held*, on demurrer, that the plea was no answer to the action, as no fraudulent misrepresentation of an existing fact was alleged. The defendant's remedy was a suit in equity for specific performance. *THE BENDMEER TIN MINING CO. v. NEWTON*. 28

CONDITIONAL PURCHASES — *See CONTRACT, 3—CROWN LANDS.*

CONTRACT—*Sale of sheep—Delivery—Cash payment—Vendor's lien.*] The plaintiff agreed to purchase certain cattle from the defendant for cash, and paid a deposit. On his arriving at the defendant's station, the cattle were counted, and the defendant allowed the plaintiff to start them on their journey, the plaintiff at the same time saying to the defendant, "I will now go up to the house (four miles off) and pay you." He did not, however, pay the balance of the purchase money in cash. The defendant, thereupon, retook possession of the cattle and scattered them over his run. *Held*, that the vendor did not waive his right of lien, as the delivery was only conditional upon payment in cash: that condition not being performed, he had a right to retake the cattle. *Held*, per STEPHEN, J., that there was no delivery at all. *KIDMAN v. PATTERSON* 290

2.—*Sale of sheep—"Sheep shewn by seller"—Construction of contract—Misdirection—Measure of damages.*] By an agreement in writing, dated July 23rd, 1885, the defendant agreed to buy sheep of certain quality and breeding, "which were shewn by the seller to Mr. B. on purchaser's behalf." B. had reported to the defendant in May, and again on July 20th, that he had seen all the sheep, and approved of their quality and breeding; and the plaintiff assured the defendant before the contract was signed, that he had shewn the sheep to B. In September, when B. went on defendant's behalf to mark the lambs and arrange for taking delivery, he told the plaintiff that the sheep then pointed out to him as those sold to the defendant were not the same which he had seen before; and he wrote to defendant saying that the sheep were not up to sample. In an action against the defendant for refusing to accept the sheep,

it appeared that B. only saw 900 of the sheep in May, and about 2000 in July; but it was proved that on both occasions the plaintiff afforded him ample opportunity of seeing all the sheep, if he had so desired. Verdict for plaintiff; damages, 978*l*. *Held*, on motion to enter a nonsuit or for a new trial, that the Judge was right in refusing to nonsuit, as there was evidence of statements by B. that he had seen the sheep. *Held*, also, that the evidence shewed that the contract had been fairly and reasonably complied with by the plaintiff, who was not bound to shew B. every single sheep. *Held*, also, that it would not have been a wrong direction to have told the jury that it was not necessary that all the sheep should have been shewn to B.; but that a direction that it was not necessary for B. to have seen more sheep than he saw in May, or that it was sufficient if he had seen only part of the sheep, would have been wrong. *Held*, also, that the Court could only look at the contract itself, and that therefore the Judge was right in disallowing a question put by defendant's counsel to defendant, "Would you have entered into the contract unless you had been assured by the plaintiff that B. had seen all the ewes?" *Held*, further, that the proper measure of damages was the difference between the contract price and the price at which the sheep were sold at auction, although they were bought in by the plaintiff, and afterwards realised higher prices. Per FAUCHER, J., following the *Prudential Assurance Co. v. Edmonds* (L.R. 2 App. Cas. 507). Where a Judge has wrongly or imperfectly directed a jury, the verdict, whether right or wrong, must be set aside. *STRICKLAND v. McCULLOCH* - - - 324

3. — *Measure of damages—Sale of station—Conditional purchases under mortgage to defendant (vendor) included in sale, but forfeited—Breach of agreement to hand over certificates of conformity—Possessory title.* The defendant sold to the plaintiffs a station, including certain conditional purchases, the certificates of conformity in respect of which were to be handed over to the plaintiffs at completion or at the end of 12 months. It turned out that one of these conditional purchases was forfeited, and that therefore the defendant could not hand over the certificate. It also appeared that the lands were under mortgage to the defendant. The defendant did not plead; judgment was signed; and the case now came on for assessment of damages. *Held*, that the proper measure of damages was the freehold value of the land less the amount per acre which the plaintiffs would have had to pay to convert their title into a freehold. *Held*, also, that the plaintiffs got no possessory title in the true sense of the word. A possessory title means a good holding title; but the plaintiffs were liable to be turned out at any moment by the Crown or by a selector. *Held*, further, that the Judge was right in not leaving to the jury the consideration of the question that the lands were under mortgage to the defendant, and that

the plaintiffs were not entitled to a transfer until the end of three years from January, 1886. *WILSON v. LOMAX*. - - - 378

4. — *Construction of—"Advance commission" to book canvassers—Bond fide orders—Repudiation—Refund of "advance commissions."* W. was engaged under a written agreement as a canvasser for the "Picturesque Atlas" Company; he was to receive 15 per cent. commission on each order, of which 7½ per cent. was to be paid as an "advance commission" on the receipt by the defendants of each *bond fide* order procured by the plaintiff. The agreement provided that if the plaintiff should "receive payment in advance of the delivery for any orders which will afterwards fail to be paid for, he shall refund all such 'advance commissions.'" While the "Atlas" was in course of delivery, and before the balance of the commission became due, a number of orders for which the plaintiff received 7½ per cent. were repudiated. *Held*, that the defendants were entitled to the set off claimed in respect of orders not *bond fide*; and that they need not wait till the whole work was ready for delivery. *Held* (JAMES, J., dissentiente), that the 7½ per cent. was the "advance commission" mentioned in the agreement. Per JAMES, J. The advance commission was the 7½ per cent., which would not be earned till sixteen parts of the "Atlas" were delivered and paid for. *WAY v. PICTURESQUE ATLAS CO.* - - - 384

5. — *Sale of goods—Construction—"The quantity will, we expect, be about"—Words of expectation and not contract.* S. wrote to H. on the 8th Dec., 1881, as follows: "We propose tendering for the supply of flour to the French Government, New Caledonia, for the flour required for 1882. Probably the deliveries will extend to February or March. The quantity required will, we expect, be about 1100 to 1200 tons superfine, and 1500 to 1600 tons fine;" and asked for their prices, which H. telegraphed, and then wrote: "We beg to confirm now this offer to you for the New Caledonian contract, and we trust the lowness of our quotations may lead to business." S. accepted H.'s terms, subject to the tender being successful. S. only obtained the contract for the fine flour; and informed H., who telegraphed: "We confirm contract for portions accepted by Noumea Government." The quantity, in fact, required by the Noumea Government was more than 1600 tons. *Held*, that by their contract, H. was bound to supply the quantity of fine flour required by the French Government, the words "the quantity required will, we expect, be about 1500 to 1600 tons fine," being words of expectation only, and not words of contract.

The contract between the French Government and S. contained a condition reserving to the French Government the right to increase or diminish by 25 per cent. the quantity mentioned in the advertisement calling for tenders. *Held*, that such a condition in such a contract

was not unreasonable, and H., though not directly bound by that or any other condition of the French contract, was bound, under his contract with S., to supply the additional quantity so required. *Held*, also, that H., having wrongfully refused to supply the full quantity of flour required, was liable to pay S. what S. had lost by demurrage. The verdict for S., with 598*l.* 15*s.* damages for short delivery, and 76*l.* damages for demurrage, to stand. Rule discharged with costs. *STOKES v. HAET* - - - - - 447

6.—*Guarantee*—“*We undertake on behalf of L. to pay*”—*Intention of parties—Surrounding circumstances—Personal liability.*] G. having commenced an action against L., and being about to apply for a writ of *ca. re.* for his arrest, his solicitors received the following letter from the defendants, L.’s solicitors:—“In this case we have seen the defendant, who is about to leave the colony to-morrow, and will probably not return. As it will be impossible in the meantime to examine him *de bene esse*, we propose to settle this case by referring it at once to some member of the Bar, or to a merchant to arbitrate upon, and we undertake, on behalf of the defendant, to pay any sum that may be awarded against him in case he is found to blame or responsible for the accident to your client. It will not be necessary to have any agreement of arbitration, and an order of reference can be subsequently drawn *nunc pro tunc*. The advantage of this course will be that the arbitrator may go on board the ship before she leaves the port, and inspect the *locus in quo*. Your early attention will oblige.—Yours truly, Norton and Smith.” L. was allowed to go; and an award was made in the plaintiff’s favour. *Held*, that looking at the intention of the parties and the surrounding circumstances, when the letter was written, the defendants were personally liable to pay the sum awarded. *GORMAN v. NORTON* - 479

COSTS — *Taxation* — *Expenses of country attorney coming to Sydney to conduct cause—Expenses of country attorney as witness—Discretion of Prothonotary—No review as to trifling amounts—Practices—Discovery—Unnecessary affidavits.*] In an action to recover 1455*l.* on a policy of fire insurance, which, when part heard, was referred by consent to arbitrators, who awarded the plaintiffs 1072*l.*, the Prothonotary on taxation of costs taxed off altogether an item of 173*l.*, the expenses of the plaintiffs’ country attorney. These expenses were claimed in the affidavit of increase, on the grounds that the attorney’s attendance in Sydney was necessary for the proper management of the cause at the hearing, and also that he was a necessary and material witness. *Held*, that both questions were entirely in the discretion of the Prothonotary, and that the Court would not interfere, as it was not shewn that the Prothonotary was clearly wrong in the exercise of that discre-

tion. *Held*, also, as to another item of 2*l.* 17*s.*, which was disallowed, that the amount was too small for the Court to interfere. *Per DABLEY, C.J.* As to the item of 2*l.* 17*s.*, that the Prothonotary was right in refusing to allow the costs of affidavits, &c., incurred through the plaintiffs’ unnecessary opposition to a summons for discovery. *BOMBALA FARMERS’ FLOUR MILLS Co. v. VICTORIA INSURANCE Co.* - - - - - 85

2.—*Taxation—Number of counsel on reference to arbitration—Discretion of Prothonotary.*] There is no rule that on the taxation of the costs of a reference to arbitration, only one counsel will be allowed on each side. Each case must depend on its own particular circumstances. Upon the trial of an action in the Supreme Court, the case, after being opened, was referred by consent to arbitration. Two counsel were retained for the plaintiff on the trial. The Prothonotary, on taxation of costs, refused, as he said, in his discretion, to allow the costs of the refresher fees of the plaintiff’s junior counsel. *Held*, that the Prothonotary had wrongly exercised his discretion, and a review was ordered. *WILSON v. LOMAX (No. 1)* - - - - - 94

3.—*Certificate under s. 101 of the District Courts Act (22 Vic. No. 18)—Detinue of deeds and breach of contract—Verdict—Amount recovered.*] In an action brought in the Supreme Court for the detinue of title deeds and breach of contract to return them, a verdict was given for the plaintiff, with 25*l.* damages for breach of contract, and the return of the deeds or their value, which the jury assessed at 279*l.* The deeds were returned. The defendant asked the Judge to hold that the case was within s. 101 of 22 Vic. No. 18, and that the plaintiff, having recovered a sum “not exceeding 30*l.*,” must obtain a Judge’s certificate before he would be entitled to his costs. *Held* (on reference to the Full Court), that the deeds having been returned, the verdict only stood for 25*l.*, and at most 1*s.* nominal damages, and that therefore the case was within the statute. *Held* also, that the case being one that ought to have been brought in the District Court, no certificate would be granted. Judgment for the defendant. *MILLER v. HALL*. - - - - - 469

4.—*Taxation—See also ATTORNEY AND SOLICITOR.*

5.—*Under Real Property Act—See REAL PROPERTY.*

CRIMINAL LAW—*Arson—Indictment for setting fire to shop with intent to defraud—Shop not insured—Evidence of intent to burn goods which were insured—Conviction sustained—46 Vic. No. 17, ss. 178, 181.*] The prisoner was charged with having “maliciously set fire to a shop with intent to defraud.” No evidence was given that the shop, which was rented, was

insured; but it was proved that the goods were insured for 500*l*. The evidence shewed that these goods, except about 50*l*. worth, had been surreptitiously removed before the fire; that fires had been lighted in 27 different places in the shop; and that the building was partially burnt. For the prisoner, it was contended that, if his object was to burn the goods with intent to defraud, he could not be convicted of setting fire to a shop with intent to defraud, the shop being uninsured. *Held*, that the setting fire to the goods and the setting fire to the shop were so much one act that it was impossible to separate them; and that as it was clear that his object was to burn the goods, the intention was not too remote. Conviction sustained. *R. v. VINING* - - - 500

2. — *Conspiracy to defraud—Evidence of other acts tending to show general conspiracy—Election by Crown—Criminal Law Amendment Act (46 Vic. No. 17), s. 331—Other persons, names unknown, jointly charged—No evidence as to such other persons.* Where two prisoners were charged upon an information for conspiracy to defraud, "that they did amongst themselves, and with divers other persons, whose names are to the Attorney-General unknown, conspire together to cheat and defraud." *Held*, that the Crown was not restricted to the proof of that one particular act of fraud, but that evidence could be given of other overt acts tending to show that similar fraudulent practices had been resorted to on other occasions, shewing that the prisoners had been carrying out a general conspiracy to defraud. *Held*, also, that the Crown could not be put to its election as to which particular act of conspiracy should be proved. *Held* further, that, the Crown having shewn that the two prisoners conspired together, it was not necessary to prove that "other persons" had been engaged in the conspiracy. Conviction upheld. *R. v. BRADFORD AND FORBES* - - - 83

3. — *Evidence—Statement by prisoner made on former trial admissible in evidence against him—Criminal Law Amendment Act (46 Vic. No. 17), s. 470.* A statement made by a prisoner under s. 470 of 46 Vic. No. 17, on a former trial, when the jury disagreed, is admissible in evidence against him at the second trial. *R. v. HUNT AND OLLIVIER* 38

4. — *Evidence—Confession, when admissible against accomplice—Cross-examination—Contradiction.* When a witness is asked immaterial questions in cross-examination, his answers must be received, and evidence cannot be given to contradict him. A Judge has a perfect right to disallow questions put for the purpose of disparaging or torturing a witness, when they cannot possibly affect his credibility. A statement made by J. in the presence of T., implicating both J. and T., and not denied by the latter, although of doubtful

value as against T., is evidence to go to the jury, who may give weight to each statement according to the circumstances of the case. *R. v. TRICKETT AND JORDAN* - - - 77

5. — *False pretences—Statement of existing fact.* The prisoner S. was convicted on an information charging him with having obtained 30*l*. from A. by a false pretence as follows:—"That he the said S. had 30*l*. to pay for his land to the Crown lands agent at Murrumbidgee on the following Wednesday, and that if he, the said S., did not pay the said sum, his land would be forfeited." *Held*, that the information was bad, as the pretence alleged did not amount to a representation of an existing or past fact. *R. v. Thorland* (5 N.S.W. L.R. 412) approved. *R. v. STEEL* - - - 53

6. — *Fraudulent insolvency—Objections to indictment—46 Vic. No. 17, ss. 310, 315—Status of Insolvency Court—38 Vic. No. 1—Affidavits—Proof of insolvency—Evidence—"Substantial wrong or other miscarriage of justice."* The prisoner was charged:—1. That his estate having been "duly ordered and adjudged to be sequestrated as insolvent" . . . he did "wilfully and fraudulently, &c., embezzle, &c., certain parts of his estate, effects, goods, money, &c." 2. That he "wilfully and knowingly did falsify and mutilate certain books of account belonging to the said estate, &c." A third count charging him with having contracted a debt fraudulently was struck out at the trial. The prisoner was acquitted on the second count, but found guilty on the first. The following points were reserved:—1. That the indictment is bad because it includes different offences not of the same kind. 2. That the indictment is bad because it includes more than three distinct offences. 3. That there is no legal evidence that the estate of the prisoner was adjudged to be sequestrated as insolvent. 4. That his Honour improperly admitted in evidence a paper purporting to be a rule nisi, and a paper purporting to be a rule absolute, adjudging the estate of the prisoner to be sequestrated. 5. That the said alleged order nisi and order absolute are improperly intitled "In the Supreme Court of New South Wales, in Insolvency." 6. That the necessary affidavit in support of the said alleged petition was not sworn in the manner required by law. 7. That there was no evidence of the receipt by the prisoner of the sums of 396*l*. 0*s*. 8*d*., 650*l*. and 68*l*. 12*s*. respectively, or any of them. *Held* (as to first and second points), that the objections ought to have been taken by way of demurrer or motion to quash the indictment under s. 310 of 46 Vic. No. 17. *Held* (as to the third and sixth points), that an order in the Insolvency jurisdiction being, by 38 Vic. No. 1, s. 1, equivalent to a judgment of the Supreme Court, could not be impeached except by way of appeal. Per the C.J. The affidavit in support of the petition was properly sworn before a commissioner for affidavits by virtue of 37 Vic. No. 10.

Held (as to the fourth point), that it was unnecessary to have tendered the rule nisi in evidence; that the Insolvency Court being a Court of record, it was not necessary for the Judge to sign the order absolute; and the paper purporting to be the order absolute was a proper record of the order. *Held* (as to the fifth point), that by 38 Vic. No. 1 the papers were properly intituled "In the Supreme Court of New South Wales;" if not, the words might be rejected as surplusage. *Held* (as to the seventh point), that as it was admitted that there was evidence to go to the jury as to the sum of 750*l.*, the point could not be sustained as to the other sums. *Per STEPHEN, J.* (as to the first and second points). While concurring with the rest of the Court, he was content to rest his judgment upon the proviso to s. 423 of 46 Vic. No. 17, that there was no "substantial wrong or other miscarriage of justice." *R. v. GOLDBERG* - 504

7. — *Forgery—Criminal Law Amendment Act* (46 Vic. No. 17), sec. 253—*Authority for payment of money.*] A forged letter, which would be a good voucher if signed by the person by whom it purports to be signed, is an authority for the payment of money under sec. 253 of 46 Vic. No. 17. *R. v. ROSE* - - - 81

8. — *Jury—Incomplete panel—Objection to, must be taken before trial—Judge's power to discharge jurors of his own motion for physical incapacity—Jury Act* (11 Vic. No. 20), s. 39—*Criminal Law Act* (46 Vic. No. 17), s. 422—*Cattle stealing—Evidence of recent possession—Killing with intent to steal—46 Vic. No. 17, ss. 73, 367.*] Before the filing of the information on which the prisoner was convicted, the Judge released from further attendance for the day 12 jurors who had been impanelled in a case of felony on Saturday morning, and were discharged on Monday morning at 10 o'clock. The cards bearing their names were not put in the box from which the names of the jury were drawn. No objection was taken at the time, but after the verdict the Judge was requested to reserve the point that under the circumstances there had been a mis-trial. *Held*, that the Judge had power to discharge the twelve jurors as he did *ex mero motu*, without waiting for them to claim exemption, under s. 39 of 11 Vic. No. 20. *Held*, also (*INNES, J., dubitante*), that the point was not one which could be raised under s. 422 of 46 Vic. No. 17; that it ought to have been raised when the prisoner was called upon to plead; and was therefore taken too late.

A steer, proved to have been stolen, was found in the prisoner's possession roped in a yard, and admittedly killed by the prisoner. It was contended that, in the absence of direct proof that the prisoner stole the animal, he could only be found guilty of killing with intent to steal under ss. 73 and 367 of 46 Vic. No. 17. *Held*, that there was evidence of recent

possession to justify a verdict of stealing. *R. v. HALL* - - - 408

9. — *Keeping a brothel—Cumulative offence—Evidence relating to one night only—Purposes of gain—Sentence—Hard labour for females—Criminal Law Amendment Act* (46 Vic. No. 17), ss. 398 & 458.] On an indictment for keeping a brothel it may be sufficient in the circumstances of the case to prove what took place on one night only. It is not necessary to prove that the accused actually received any gain or profit. Section 398 of the *Criminal Law Amendment Act*, by which light labour is substituted for hard labour in the case of a female, does not apply to those common law misdemeanours for which hard labour may be imposed by section 458. Section 398 only applies to statutory misdemeanours. *R. v. HARRISON* - - - 57

10. — *"Maliciously" inflicting grievous bodily harm—Intent to injure—Criminal Law Amendment Act* (46 Vic. No. 17), ss. 7 & 24—*Second count for common assault.*] On an indictment for maliciously inflicting grievous bodily harm, the intent rather than the result of the act must be considered. The jury should be directed to consider whether the act was done recklessly and wantonly. The words "with intent to injure," in s. 7 of the *Criminal Law Amendment Act*, mean with intent to inflict some substantial injury. Where a prisoner caused injury to a boy by throwing a bucket of hot water over him, and the Judge directed the jury that it did not matter whether he knew it was hot or not, and that if they considered that grievous bodily harm resulted to the boy from the act, they ought to find him guilty. *Held*, a wrong direction. Conviction quashed. *Per curiam.* The case should have been allowed to go to the jury on the second count for common assault. *R. v. HARVEY* - - - 89

11. — *Perjury—Leave to prosecute for—See NEW TRIAL.*

12. — *Practice—Right of prisoner to be defended at Quarter Sessions by two or more attorneys—Discretion of Judge—13 Vic. No. 7, s. 7—Criminal Law Amendment Act* (46 Vic. No. 17), ss. 3 (o) & 342—*Substantial wrong—46 Vic. No. 17, s. 423.*] By s. 342 of 46 Vic. No. 17: "Every accused person shall in all Courts be admitted to make full answer and defence by counsel, as the term is by this Act defined." By s. 3 subs. (o): "The term counsel shall include attorneys in all Courts where attorneys now practice, or shall hereafter practice, as counsel." By s. 7 of 13 Vic. No. 7: "In all Courts of Quarter Sessions attorneys shall be allowed to practice and act as counsel, and be heard in all matters before the said Courts in the same manner as barristers now are in the said Courts." This Act was repealed by 46 Vic. No. 17, and the provisions of s. 7 were

not re-enacted. A chairman of Quarter Sessions, on objection being taken, refused to allow two attorneys to jointly conduct the defence of a prisoner. *Held*, that although the express words of s. 7 of 13 Vic. No. 7 were not re-enacted, the terms of ss. 342 and s. 3 subs. (c) of 46 Vic. No. 17 placed attorneys on the footing of barristers, as far as the Courts of Quarter Sessions were concerned; and, therefore, two attorneys could (just as two barristers might) jointly defend a prisoner. *Held*, also, that inasmuch as the prisoner had been deprived of a right conferred upon him by the Act of being defended by two attorneys, he had suffered a "substantial wrong" within the meaning of s. 423 of 46 Vic. No. 17. *Per curiam*. Although every presiding Judge has a discretion to regulate the practice in his own Court, so as to prevent any misconduct or breach of decorum, he cannot for any other reason refuse to hear counsel. *R. v. O'Neill* (6 N.S.W. L.R. 48) distinguished and explained. *R. v. MATTHEWS* 45

18.—*Practice—Mode of appeal—Point of law arising after sentence—Writ of error—Criminal Law Amendment Act* (46 Vic. No. 17), ss. 422, 427.] A point of law arising after sentence cannot be reserved under section 422 of 46 Vic. No. 17. The proper course is to proceed by writ of error under section 427. *R. v. LMOUNT* 66

14.—*Sentence—Common law misdemeanour—Discretion of Judge—Habeas corpus.* In the case of common law misdemeanours, where the term of imprisonment is not limited by statute, the sentence is entirely in the discretion of the Judge. Note to *R. v. Matthews* (2 S.C.R. 227) explained. *Semble*, the proper mode of bringing the question of the legality of a sentence before the Court is by writ of *habeas corpus*. *Re FORBES* 68

CROWN—See GOVERNMENT.

CROWN LANDS—Crown Lands Act of 1884 (48 Vic. No. 18), s. 125—*Procedure before land board—Death of applicant—Adjournment by land board pending administration.* W., an applicant to convert a pre-lease into a conditional lease, under 48 Vic. No. 18, died before the application came before the local land board. After one adjournment, for evidence of the deceased having any legal representative, the board refused a further adjournment although they were informed that an application for letters of administration was pending, and disallowed the application. *Held*, that the board were wrong in not acceding to the request for a further adjournment. Decision reversed. *In re WHITE* 135

2.—*Crown Lands Act, 1884* (48 Vic. No. 18), ss. 21 (9), 29, 54, 71 and 74—*Application for conditional lease—Leasehold area—"Alienated land" in s. 74—"Available" land in s. 29*

—*Conditional sales and conditional leases on same footing.*] After the passing of the *Crown Lands Act* of 1884, and within the period prescribed by s. 54, Parry, a conditional purchaser on Pitt's run, applied for a conditional lease of adjoining land. Pitt had lodged his application for a pastoral lease within the period prescribed by s. 71. The notification of the division of the run was gazetted before Parry's application for a conditional lease came on for hearing before the land board; and the land, the subject of his application, was situated within that portion of Pitt's pastoral holding which the Minister determined should be the pastoral area. The local land board confirmed Parry's application. *Held* (on appeal under s. 140), reversing the decision of the land board, that the mere application for a conditional lease confers no right as against the pastoral lessee; and that the right of the pastoral lessee, who by the notification became entitled to a pastoral lease of the leasehold area, must prevail. *Held*, also, that a conditional lease being an inchoate conditional sale (s. 50), a notified leasehold area is exempt from conditional lease as from conditional sale under s. 21. By s. 29, "if upon the report of such surveyor it shall appear that the land is 'available,' then the board shall confirm the application, &c." *Held*, that the word "available" refers to land that is available at the time of the inquiry by the land board, does not relate back to the date of the application. *Per curiam*. The words "alienated land" required by s. 74 to be marked on the plan of a pastoral holding, are not synonymous with the expression "lands granted by the Crown in fee," and must be taken to include land held under pre-emptive lease, and all land alienated as far as the pastoral lessee is concerned. *In re PARRY* 242

8.—*Crown Lands Act, 1884* (48 Vic. No. 18), ss. 21 (IV.), 101, 140—*Lands reserved or set apart for cities, towns, or villages—Suburban lands attached thereto—Conditional purchase, within limits, lapsing—Not open to selection—Practice—Right of reply.* In 1883 S. took up a conditional purchase of 195 acres which was declared lapsed in February, 1886. In March, 1885, a reserve for "Cities, Towns, or Villages," under s. 101 of the *Crown Lands Act, 1884* (48 Vic. No. 18), was proclaimed, and the limits of the "Suburban lands" to be attached thereto were also notified in the *Gazette*. Within these limits S.'s 195 acres were situated. On S.'s selection being declared lapsed in 1886, W. applied to select it, but the land board refused the application. *Held*, that the decision of the land board was right, as the land being within the limits of the "suburban lands" was exempt from conditional sale under subs. 4 of s. 21 of 48 Vic. No. 18. *Edols v. Tearle* (7 N.S.W. L.R. 374) followed. [NOTE.—*Edols v. Tearle* was reversed by the Privy Council. See Appendix, p. 518.] In cases stated by the

Minister under s. 140 of 48 Vic. No. 18,
counsel for the Crown has the right to reply.
In re WILSON - - - - - 309

CUSTOMS ACT—42 Vic. No. 19, ss. 44-49—
See BILL OF LADING.

DAMAGES—*Measure of*—*See CONTRACT.*

DEED—*Construction*—*Absolute conveyance by trustee under will—Reversion only in testator—Words of conveyance—"Enfeoff," &c.—Unexpired lease to trustee—Estoppel—Priority of registration.*] C., having an unexpired lease of certain real estate from Q., was appointed executor and trustee jointly with one Burke under Q.'s will, with directions to sell all the testator's real and personal estate. Burke disclaimed. After Q.'s death, C., pursuant to such direction, sold to the plaintiffs the real estate, of which C. was in possession under the lease. The conveyance recited the testator's seisin in fee in possession and his death, C.'s appointment as trustee jointly with Burke, and Burke's disclaimer; the direction to sell; and sale by C. as trustee; but contained no reservation of C.'s lease, and purported to convey the fee to the plaintiffs by, amongst other operative words, the words "enfeoff." *Held*, that C. was estopped from setting up that the plaintiffs took subject to the lease; and that, although the testator had only a reversion, the conveyance passed the fee simple in possession freed from the lease. The conveyance was registered by the plaintiffs, and subsequently C. registered his lease. *Held*, that such registration by the plaintiffs gave their conveyance priority over C.'s lease under section 11 of the *Registration of Deeds Act* (7 Vic. No. 16); C., after his conveyance to the plaintiffs in the form in which it was executed, having no lease in existence to register. *BURROWS v. CRIMP* - - - 198

DISCOVERY—*See COSTS.*

DISTRICT COURT—*Jurisdiction.*] An action will lie in the District Court on a judgment recovered in the Supreme Court. *DUFFY v. DE ROZZOLI* - - - - - 158

2.—*Appeal—Motion in Chambers—Adjourned hearing must be before the same Judge*—44 Vic. No. 30, s. 1—*Time for moving—Costs of married woman on taxation.*] Under 44 Vic. No. 30, s. 1, which gives an appeal by motion from the decision of a District Court to the Supreme Court, and enacts that when the Supreme Court is not sitting in Banco, "such motion may be made before any Judge thereof;" where a Judge in Chambers has partly heard and adjourned such motion, no other Judge has jurisdiction to hear such adjourned application. So, where a motion was made in time and adjourned for the Judge's notes to be procured, and afterwards, after the eight days had expired, was resumed

before another Judge, it was held to be a fresh motion, and therefore out of time. Special order as to costs of married woman. *SLOCOMBE v. HENDERSON* - - - - - 186

3.—*Appeal—District Courts Act*—(22 Vic. No. 18), s. 94—*Security—Verdict for defendant—Attachment of debt equal to amount of taxed costs—Right to have full security given.*] A District Court appeal will be struck out with costs if the security required by s. 94 of the District Courts Act (22 Vic. No. 18) has not been perfected. Where the appellant (plaintiff) had given security in the amount of 80*l.*, and claimed to be exonerated from giving any further security, inasmuch as the respondent had attached debts in the hands of a creditor of the plaintiff sufficient to cover the amount of the taxed costs. *Held*, that although the respondent had a right to attach the money, he was also entitled to have the full security given in accordance with s. 94. *CLEMENT v. DECENT*. - - - - - 150

4.—*Appeal—Appeal by motion under 44 Vic. No. 30, sec 1—Note must be taken by Judge—Request of party.*] At the trial of an action in the District Court, a point of law was raised and argued, and the Judge gave his ruling upon it; but he was not asked to make a note of the point, nor did he in fact make any note of the point. *Held*, on appeal by way of motion, under 44 Vic. No. 30, sec. 1, that a rule obtained on affidavit must, in the absence of any note by the Judge, be discharged. But, where a Judge does take a sufficient note, the mere fact that he was not requested to do so is immaterial. *Held*, further, that a party who has not complied with the statute so as to enable him to appeal by way of motion, may still appeal by way of special case, the provisions as to which have not been repealed. *BADGERY v. MURPHY* - - - - - 876

5.—*Certificate under s. 101 of 22 Vic. No. 18—Detinue of deeds—Amount recovered.*] *See COSTS* 3.

6.—*And see CERTIORARI.*

EJECTMENT—*See LANDLORD & TENANT.*

ESTOPPEL—*See BILL OF EXCHANGE—DEED.*

EVIDENCE—*Wrongful dismissal—Plea of payment into Court only—Evidence of misconduct not admissible in mitigation of damages.*] Where a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would be a bar to the action is not admissible in mitigation of damages. Thus, where in an action for wrongful dismissal, the defendant pleads only payment of money into Court, he cannot prove, in mitigation of damages, that he discharged the plaintiff for misconduct. *FRANSTON v. JONES* - - - 129

2.—*Attorney and client, communications between—Privileged communication—Insolvency examination—Attorney acting for bill of sale holder as well as for insolvent.*] During the examination of G., an insolvent, before the Chief Commissioner for Insolvent Estates, it appeared that S., who had been acting as G.'s attorney, had, as K.'s attorney, drawn a bill of sale from G. to K. One of the objects of the examination was to impeach this bill of sale as a preference. S., being asked the question, "Did G. state in the presence of K. that he (G.) was unable to meet his liabilities?" refused to answer on the ground that he was privileged as G.'s attorney. *Held*, in accordance with the view of the Chief Commissioner, that he was bound to answer the question. As K.'s attorney, he was not protected by any professional privilege, although he was G.'s attorney as well. *In re GRIFFIN* - - 182

FRAUD—Purchase of shares—See COMPANY.

FUGITIVE OFFENDERS — *Imperial Act (44 & 45 Vic. c. 69), ss. 9, 13, and 19—Destitute Persons (New Zealand) Act (41 Vic. No. 44), ss. 16, 17, and 26—Destitute Persons (New Zealand) Act Amendment Act (47 Vic. No. 26), s. 2—Arrest for non-payment of money under maintenance order—"Trivial" offences under s. 19 of 44 & 45 Vic. c. 69—Discharge ordered upon terms.*] C. was arrested on an extradition warrant issued, under s. 13 of the *Fugitive Offenders Act (44 & 45 Vic. cap. 69)*, by a magistrate of the colony of New Zealand, and properly indorsed in this colony, charging him with having disobeyed an order made under the provisions of the *New Zealand Act of 1877 (41 Vic. No. 44)*, adjudging him to pay 1*l.* per week for the maintenance of his wife, and alleging that 2*8*l.** was then due and owing. By s. 26 of the latter Act, C. was liable, for the non-payment of this money, to six months' imprisonment. The offence was, therefore, one "punishable by law" within s. 13 of 44 & 45 Vic. cap. 69; and it was admitted that by an Order in Council, made under s. 12 of that Act, New South Wales and New Zealand had been included in the same group of British possessions. The magistrate before whom C. was brought ordered that he should be returned to New Zealand, but admitted him to bail pending an appeal to the Supreme Court. *Held*, on appeal (*INNES, J., dissentiente*), that as the offence charged was only the non-payment of money ordered to be paid, it was a "trivial offence," within the meaning of s. 19 of 44 & 45 Vic. cap. 69, and ordered C.'s discharge upon terms. *Per tot. cur.* The justice of the case would be met by ordering C. to pay the money due and certain costs and expenses, on his entering into a bond for the discharge of future payments. *Per INNES, J.* The words "or otherwise" in s. 19 of 44 & 45 Vic. cap. 69 were sufficient to warrant the Court in making such an order. *Ex parte COUNSEL* - - - - - 815

GARNISHEE—See GOVERNMENT, 2.

GOVERNMENT — *Claims against Government Act, 39 Vic. No. 38—Tort will lie against the Crown.*] *Held*, by the judicial committee of the Privy Council, affirming the decision of the Supreme Court (reported 7 N.S.W. L.R. 1), that the words of the Act 39 Vic. No. 38, extending the provisions of the Act 20 Vic. 15 in favour of the subject, are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Justice also requires that full effect should be given to the words of the Act. The local Governments in the colonies, as pioneers of improvements, have to embark in undertakings which in other countries are left to private enterprise, e.g., the construction of railways, canals, &c., in the course of which it is necessary to employ many inferior officers and workmen; therefore, to apply the maxim that "the King can do no wrong," would work much greater hardship than it does in England. *BOWMAN v. FARNELL (Priv. C.)* - - 222

2.—*Payment by Government under garnishee order—Attachment of money due to plaintiff under contract with Government officer—Voluntary payment—Common Law Procedure Act of 1857 (20 Vic. No. 31), ss. 27, 29 & 31.*] To a declaration for work and labour done by the plaintiff for the Government at their request, the nominal defendant pleaded that the money had been attached by a Judge's order, and paid by the Government under a garnishee order to a judgment creditor of the plaintiff. To this plea the plaintiff demurred, on the ground that the garnishee sections of the *Common Law Procedure Act of 1857* did not extend to debts due by the Crown; and that the protection afforded by s. 31 of that Act did not extend to payment under an order made without jurisdiction. Replication that the debt arose out of a contract made with one Bennett, Commissioner for Roads, on behalf of the Government: that the money was attached in his hands, and the garnishee order made as against him; and that the Government were not made a party to the order. To this the defendant demurred, on the ground that the Government and Bennett were bound to obey the Judge's order, unless reversed; and that they were protected under s. 31. *Held*, that the orders, having been made as against Bennett, were founded in error, as Bennett was not personally liable for the money; that the Government were not bound by these orders; and, therefore, the payment of the money by the Government was a voluntary payment, and one which could not be relied upon as a defence to the action. Judgment for the plaintiff. *CONNOLLY v. JYNE* - 231

HABEAS CORPUS—See CRIMINAL LAW, 14.

HUSBAND AND WIFE—See PRINCIPAL AND AGENT.

INSOLVENCY—*Order and disposition—Bill of sale over furniture allowed to insolvent (grantor) by creditors—Furniture at time of insolvency in hands of bailiff—Trove by bill of sale holder (an assenting creditor) against grantor—Insolvency Act (5 Vic. No. 17), ss. 34, 55.* On the 6th October, 1885, the defendant gave the plaintiff a bill of sale, which was never registered, over certain household furniture. On the 9th April, 1886, the defendant gave a second bill of sale, which was registered on the 28th April, over the same furniture, to one Tait. On the 11th May, 1886, the defendant became insolvent, the furniture at the time being in the possession of a bailiff under a writ of execution. On the 9th June, 1886, T. assigned his bill of sale by deed to the plaintiff. Neither T. nor the plaintiff proved for any part of the debt secured by the bill of sale. On the 19th August, 1886, the plaintiff joined with the other creditors in allowing the defendant his furniture, including the furniture comprised in the bill of sale; and the allowance was duly ratified by the Chief Commissioner. The plaintiff brought an action in the District Court against the defendant for conversion and detinue of the furniture, and was nonsuited on the ground that, having joined in the directions allowing the defendant his furniture, must be taken to have abandoned his claim upon it. *Held* (on appeal), that, as at the time of the insolvency, the furniture was in the hands of a bailiff, and not in the "possession, order, or disposition" of the insolvent within the meaning of s. 55 of 5 Vic. No. 17, the action was maintainable. *DAVIDSON v. DENNIS* - - - 282

INSOLVENCY COURT—*Status of*—See CRIMINAL LAW, 6.

INSPECTION—*Of documents*—See COSTS.

INSURANCE (FIRE)—*Latent ambiguity on policy—Question for the jury whether the policy covered the goods.* Where the evidence disclosed that on the policy there was a latent ambiguity, which made it necessary to go into the consideration of other documents and to resort to parol evidence, it ceased to be a question of construction for the Court, but became a question of fact for the jury, namely, whether the policy covered the goods. *HORDEEN v. COMMERCIAL UNION ASS. CO.* (Priv. C.) - - - 210

INTERPLEADER—*Small Debts Court—Deposition in support of claim need not be on affidavit—Small Debts Recovery Act (10 Vic. No. 10), s. 32—Practice of Court.* By s. 32 of 10 Vic. No. 10, it is enacted that, in all interpleader claims, "such claim shall be deposed to before a Justice of the Peace, and in such deposition it shall be averred, &c." *Held*,

that a claimant may "depose" orally in the witness-box at the hearing. The practice of the Small Debts Court, that such deposition could only be made on affidavit, was inconsistent with the Act, and could not be upheld. *Ex parte SHORTER* - - - 127

JUDGMENT—*District Court judgment set aside for irregularity committed by bailiff*—See TRESPASS.

2.—*Action on*—See DISTRICT COURT.

JURY—*Incomplete panel—Objection to must be taken before trial—Judge's power to discharge jurors.* *B. v. HALL* - - - 408

JUSTICES—*Search warrant—Games and Wagers Act (14 Vic. No. 9), s. 1—No fresh summons or information—Prohibition.* A defendant, having been arrested on a search warrant, under the *Games and Wagers Act* (14 Vic. No. 9) and allowed bail, appeared on the day mentioned in the recognisance, and an objection taken on his behalf, that a fresh information and summons should have been served on the defendant having been overruled, the case proceeded and the defendant was convicted and fined. *Held*, on motion for a prohibition, that as the information, warrant, arrest, charge, and conviction were under the same Act, a fresh information was not necessary. *Blake v. Beech* (L.R. 2 Ex. D. 335) distinguished. *Held*, also, that the charge was sufficiently stated in the information to ground the search warrant, which was read at the hearing; and that it was manifest under the circumstances that the defendant must have been called upon to plead. *Ex parte AN HING* - - - 412

LANDLORD AND TENANT—*Ejectment—Common Law Procedure Act, 1853 (17 Vic. No. 21), s. 165—Mesne profits—Special damage.* In ejectment under s. 165 of the *Common Law Procedure Act, 1853*, a plaintiff is entitled to recover as mesne profits the rent he might have obtained but for the defendant's holding over, together with interest on a sum offered as a bonus for the good-will of the premises. But he is not entitled to receive special damages for the loss occasioned by his being unable to enter into such contract. *LEE v. BLAKENEY* - - - 141

2.—*Eviction—Expulsion of sub-tenant—Re-entry by tenant—Action for rent.* Where a sub-tenant is evicted and the tenant resumes possession (as, for instance, by taking the keys from the sub-tenant, and not immediately handing them over to the landlord), puts an end to the eviction; and the landlord's right to rent is only suspended during the continuance of the eviction. To constitute an eviction there must be some act of a grave and permanent character done by the landlord with the intention of depriving the tenant of

the enjoyment of the demised premises. Whether in this case there was sufficient evidence of an eviction, *quære*. *UMDE v. ASCHKE* - - - - - 472

LIBEL—*Privileged communication—Mutual interests.*] In an action for libel, the defendant, acting in the interests of the creditors of the plaintiff, who had sequestered his estate, entered into negotiation with the solicitor of the plaintiff's wife, who had considerable property settled to her separate use, to make arrangements for the mutual benefit of the plaintiff and his creditors. During the progress of the negotiation the defendant, at the request of the solicitor, wrote the latter a letter in which he made grave charges of misconduct against the plaintiff, and, further, offered to keep back certain proceedings which would render the plaintiff liable to penalties under the Insolvency Act. This letter was published, and is the libel declared upon. The Judge at the trial ruled that the occasion was not privileged, and the plaintiff recovered 200*l.* damages. *Held* (on motion for a new trial), that the letter was written on a privileged occasion; and that the case must go down for a new trial in order that the question of *mala fides* and malice might be submitted to a jury. Rule absolute for a new trial. *MANN v. SMITH* (No. 2) - - - 422

LICENSING ACTS—45 Vic. No. 14, s. 25—46 Vic. No. 24, s. 8—*Packet licenses—Magistrates wrong in law without deciding facts—Prohibition.*] Packet licenses are not restricted to sea-going vessels, and under such licenses liquor may be sold on board of any vessel navigating inland waters other than a harbour. The magistrates having given a wrong decision on a question of law, without deciding the facts, the Court set aside the conviction. *Ex parte BOGAN* - - - 409

LIEN—*Lien of vendor of goods—See CONTRACT.*

MARRIED WOMAN—*Costs—See DISTRICT COURT, 2.*

MASTER AND SERVANT—*Implied authority—Course of employment—Negligence of servant when not engaged in his master's business.*] The defendant was the contractor for the excavation of the Bondi sewer. C. was his business manager, whose duties it was to attend to the office work and the financial arrangements. C., being lame, kept a horse and buggy of his own, but not for use in the course of his employment. The defendant, being temporarily absent, left C. in charge of the works, with the additional duties of giving orders to the men and supplying them with material. During the defendant's absence, C. used the defendant's horse and buggy, without his knowledge or consent. One evening, C., while so using the defendant's horse and buggy, after calling at the

works to see what was going on, was on his way home when he met a friend, with whom he turned back and drove to a public-house. While they were inside, the horse bolted and injured the plaintiff. *Held*, that, even assuming that C. had defendant's implied authority to use his horse and buggy, he was not at the time of the accident in any sense carrying out the defendant's employment; and that therefore the defendant was not liable for C.'s negligence. *JOHNSON v. PRITCHARD* - - - - - 6

Z.—*And see NEGLIGENCE.*

MAXIM—*Volenti non fit injuria—See NEGLIGENCE.*

MUNICIPALITIES—*By-law—Knowing causing interment of dead body within 100 yards of street—Evidence of knowledge.*] An information was laid against L. for that she "did knowingly cause to be interred a certain dead body" . . . in a certain cemetery, "within a distance of 100 yards from a public street," . . . contrary to the by-laws, etc. *Held*, that the magistrates were right in dismissing the case, in the absence of any evidence to show actual knowledge on the part of L. that the burial-place in question was within the prescribed distance. *BOROUGH OF NEWCASTLE v. LUDLOW* - - - 98

2.—*Election of alderman—Sydney Corporation Act (43 Vic. No. 3), ss. 8 and 50—Votes improperly received—Names wrongly on list of citizens—Onus of proof.*] At the election of an alderman for Bourke Ward, in the city of Sydney, J. was elected by a majority of four votes over M., the applicant. By section 8 of the *Sydney Corporation Act* (43 Vic. No. 3), a list of citizens capable of voting must be prepared for each ward, so as to contain, in accordance with Schedule D., the Christian name and surname of each person. This list, when revised, becomes the roll, according to which the votes are recorded. On the roll then in force were the names of sixty firms or trading companies, entered thus, "Abbott & Dodds," Brown & Co.," &c., and votes were proved to have been received in respect of at least fifteen of these firms. *Held*, that such votes were improperly recorded, and, inasmuch as it was impossible to ascertain whether the successful candidate would have obtained a majority if they had been rejected, the election was invalid. A mere irregularity or breach of the electoral law does not necessarily vitiate an election, if it can be shown that it did not affect the result of such election. *Ex parte MOORE, In re JEANNERET* - - - 108

3.—*Election of mayor—Municipalities Act of 1867 (31 Vic. No. 12), s. 42—"Such mode of voting as they may deem expedient"—Determining by lot—Municipalities Act of 1867 Amendment Act of 1874 (37 Vic. No. 15), s. 3—Acquiescence of relator—Distinction between application under s. 99 of 31 Vic. No. 12 and quo warranto.]*

There were three candidates for the office of mayor. It was arranged that each alderman should have two votes, that the candidate who had the least votes should retire, and that there should be a fresh ballot, as between the other two. At the first ballot A. polled seven votes, B. and C. five each. It was then agreed that B. and C. should draw lots to see who should retire. B. (respondent) drew the winning lot. A fresh ballot was then taken, and A. and B. got six votes each. Lots were thereupon drawn under 37 Vic. No. 15, s. 3, and B. again drew the winning lot. *Held*, that this was a mode of election within the meaning of s. 42 of 31 Vic. No. 12, and a rule nisi, under s. 99 of 31 Vic. No. 12, granted on A.'s application was discharged, but without costs. *Per curiam*. In a proceeding under s. 99 of 31 Vic. No. 12 a relator is not in the same position as in proceedings *quo warranto*, and is not disqualified from applying by acquiescence in the irregularity of which he complains. *Ex parte* TURNER: *In re* DUNN - - - 163

4.—*Rates—Municipalities Act of 1867* (31 Vic. No. 12), s. 163—*Private property used for public purposes exempt from rates—Water supply—Sydney Corporation Act* (43 Vic. No. 3), s. 142.] By s. 163 of 31 Vic. No. 12 "land the property of Her Majesty and unoccupied or used or reserved or vested in trustees for public purposes," is exempted from liability for municipal rates. The defendant owned certain land which was occupied by the municipal council of Sydney for the purposes of the Sydney water supply. *Held*, that the land was "used for public purposes" within the meaning of s. 163 of 31 Vic. No. 12, and was therefore not ratable. *The Borough of Paddington v. the Municipal Council of Sydney* (2 N.S.W. L.R. 235) followed. BOROUGH OF RANDWICK v. COOPER - - - 1

5.—*Liability of, for negligent construction of road by Government officers—See NEGLIGENCE.*

NEGLIGENCE—Alignment of "trust" road—Liability of municipality—Municipalities Act, 1867 (31 Vic. No. 12), ss. 118, 128.] The defendant municipality having been placed by the Government in charge of a "public" road in the place of trustees, and entrusted with the expenditure of the annual vote for the maintenance of the road, but it was not vested in them by proclamation, so as to place it under their care and management, under s. 118 of 31 Vic. No. 12, the defendants applied to the Government to have the road aligned. The Government sent a surveyor to superintend the work, on condition that the municipality supplied men and materials for the work. *Held* (INNES, J., *dubitante*), that under the circumstances, the municipality was not liable for injuries sustained by the plaintiff through the negligent placing of the alignment posts. PARK v. MUNICIPALITY OF CANTERBURY - - 101

2.—*Master and servant—Defect in machinery—Equal knowledge—Volenti non fit injuria.*] The plaintiff, the engineer of a steam tug belonging to the defendant (who was also the captain), complained to the defendant of a leak in the boiler, which to the plaintiff's knowledge had been recently repaired. These complaints were made before the vessel left her moorings at Sydney, and again while she was on her way to Watson's Bay, in Port Jackson. At that place she was examined, but the cause of the leak could not be discovered. The defendant, nevertheless, ordered the plaintiff to proceed to sea, promising that the defect should be remedied when the vessel returned to Sydney. The plaintiff obeyed this order, and while at sea sustained injuries from an explosion caused in all probability by this defect. The plaintiff sued the defendant for negligence. *Held*, that as the plaintiff's knowledge of the risk was equal to, if not greater than, that of the defendant, the latter was not liable; and the plaintiff, having obeyed the order to go to sea, which he was not bound to do, had voluntarily encountered the risk, and therefore, in accordance with the maxim *volenti non fit injuria*, could not recover. SIMAT v. SILVA - - - 415

3.—*Pleading—"Negligently drove and managed"—Inherent vice of horse—Evidence for jury.*] The declaration alleged that the defendant, by his servant, so "negligently and unskilfully drove and managed" a certain cart and horses, and it appeared at the trial that one of the defendant's horses was to the knowledge of the defendant addicted to shying, and, by shying, caused the accident. *Held* (INNES, J., *dissentiente*), that the plaintiff could not rely upon such evidence as shewing negligent "driving" or "management," but the declaration ought to have contained a count for "negligently using a shying horse," which might have been added upon amendment at the trial. *Per INNES, J.*: That it was at all events arguable whether the using of a horse known by the driver to be addicted to shying, though it may not have been negligent "driving," was or was not negligent and improper "management" of the cart and horses. PATTERSON v. KIDMAN - - 488

4.—*And see MASTER AND SERVANT.*

NEW TRIAL—Application to Judge for leave to institute prosecution for perjury—Criminal Law Amendment Act (46 Vic. No. 17), s. 300—*Postponement of new trial motion.*] Upon an application for leave to institute proceedings for perjury under s. 300 of the *Criminal Law Amendment Act*, it is the duty of the Judge to decide whether the applicant is acting *bona fide* and not from vexatious or harassing motives; it is for the magistrate, and not for the Judge, to decide whether there is a *prima facie* case against the accused. The Court refused to adjourn the argument of a new trial

motion, in order that a prosecution of certain witnesses for perjury in respect of the evidence given by them at the trial, might be instituted. **GOLDSBROUGH v. M'MAHON (No. 1)** - 118

2.—*Verdict demonstrably wrong—Principles on which new trials are granted.*] A new trial should never be granted except where the verdict is such that justice has not been done, or such as reasonable men ought not to have found. **COOPER v. RUTHERFORD** - 192

3. — *Verdict against evidence—Verdict "demonstrably and manifestly wrong and unjust."*] Where a verdict is so demonstrably and manifestly wrong and unjust, as to convince the Court that justice had not been done, and establish the fact that the jury did not really perform their duty, it will be set aside. **GOLDSBROUGH v. M'MAHON (No. 2)** - 265

4.—*Weight of evidence—Opinion of Judge at trial—Verdict must be unreasonable and unjust, and such as reasonable men ought not to have found—Improper admission of immaterial evidence—Independent evidence to support verdict.*] Although the opinion of a Judge who tries a case is by no means conclusive, yet in determining whether a verdict is against evidence his opinion must be taken into serious consideration, and should form one of the elements upon which the Court is to base its determination. It is not sufficient for the Court to say that on the evidence appearing on the Judge's notes, they would have come to a different conclusion; nor is it sufficient that the Court may think the verdict eminently unsatisfactory. In order to set aside a verdict as being against evidence, such verdict must be not only unsatisfactory, but unreasonable and unjust, and such as reasonable men ought not to have found. The Court does not exercise the function of a mere appeal from a jury; and it is not the duty of the Court to go over the same ground as the jury, and reverse their decision, merely because it arrives at an opposite conclusion. A new trial will not be granted on the ground of the erroneous reception of evidence, if such evidence is not material, nor if, though it be material, there is, independently of it, evidence to support the verdict. **Gordon v. The Bank of New South Wales (7 N.S.W. L.R. 122)** followed. **CROSS v. GOODE** - 255

PARTNERSHIP—Dissolution—Insolvency of continuing partner—Parties to action by—See PRACTICE.

PAYMENT INTO COURT—Effect of plea of—See EVIDENCE.

PENALTY—Constitution Act (18 & 19 Vic. cap. 54), ss. 28 and 29—Parliamentary disqualifications—Contract or agreement "for or on account of the public service."] The plaintiff sued under s. 29 of the Constitution Act (18

and 19 Vic. cap. 54), to recover a penalty of 500*l.* from the defendant, for that while he was a member of the Legislative Assembly of New South Wales, &c., he did, by himself, or by some person or persons in trust for him, &c., undertake, execute, hold, and enjoy a certain contract "for or on account of the public service," within s. 28 of the same Act. It appeared that the defendant became one of the guarantors of a contractor with the Government, and took an assignment of the contract by way of security. He did not receive any of the moneys payable on the contract, nor did he obtain the consent of the Government to the assignment, as required by a section of the contract. *Held*, that defendant by taking the assignment did not become a contractor with the Government, "for or on account of" the public service, so as to render himself liable to the statutory penalty. **PROUDFOOT v. PROCTOR** - 459

PLEADING—Assignment of estate in trust for creditors—Action by non-assenting creditor—Sufficiency of averment that the plaintiff's name appeared in the schedule of creditors under ss. 33 and 35 of 5 Vic. No. 9—Amendment of pleadings on demurrer.] To an action on a promissory note the defendant pleaded a deed of assignment "in conformity with the Act," 5 Vic. No. 9 (ss. 33 and 35), and a deed of covenant to release the defendant from all debts, &c., and all actions, &c., in respect thereof. The plea set out that the deed of assignment was made "between the defendant of the first part, and A. B. and C. D., trustees of the second part, and the several persons and bodies corporate creditors of the third part," and that it was made "for the benefit of the said parties of the third part." *Held*, on demurrer, that the plea was good; but that it would be better to amend it by inserting the words "being all the" before the word "creditors." And the amendment was allowed to be made. *Held*, also, that the words "in conformity with the Act" governed the second deed (of covenant to release) as well as the first, and that, therefore, it was to be presumed, though there was no allegation in the plea to that effect, that the plaintiff's name was in the schedule as required by the Act. An amendment was also allowed on this point. *Per curiam*. Where a purely technical point is taken, the Court will allow an amendment to be made on demurrer. **JACOBS v. SMITH - 21**

2.—*Separate condition in agreement—Cross-action.*] To a declaration on an agreement for the supply of 2000 tins of boiled beef, alleging that it was a term of the agreement that the defendant should make good all loss sustained by the plaintiff through blown tins on the receipt of survey reports, and claiming damages for the loss sustained by reason of a number of the tins being blown; the defendant pleaded, thirdly, that under the agreement the plaintiff was bound

to furnish to the defendant, within a reasonable time, the survey report, and did not furnish the same; and, fourthly, that it was a term of the agreement that the defendant should, on the receipt of the survey report, have the option of having the blown tins returned to him on payment of freight, &c., but the plaintiff, though duly notified, refused to return the blown tins to the defendant. *Held*, that the pleas were bad, as the said conditions were not conditions precedent to the plaintiff's right of action, but ought to be pleaded by way of cross-action. Leave to amend accordingly. *JOHNSTON v. PRESTON* - 146

8.—“*Negligently drove and managed*”—See NEGLIGENCE.

4.—*Payment into Court—Effect of plea—See EVIDENCE.*

PRACTICE—*Vacation business—Reg-Gen. 17th Dec., 1886, rule 25—No pleadings can be filed in vacation, even in actions upon bills of exchange, &c., without leave of a Judge.*] By R. 25 of the *Reg-Gen.* of 17th Dec., 1886:—“During the vacations, no other business than that above specified will be taken without the leave of a Judge, nor shall any pleadings be filed or delivered without such leave, not shall time run at law or in equity, except in the case of actions upon bills of exchange, promissory notes and cheques, in which case time shall, for all purposes, run at law.” *Held* (*INNES, J., dissentients*), the exception only applied to time running, and that it was still necessary to obtain the leave of a Judge before filing pleadings in actions on bills, &c., as in other actions. *THE FEDERAL BANK v. DAVIS* - 15

2.—*Parties—Action brought in names of partners—Dissolution of partnership—Insolvency of continuing partner—Name of official assignee cannot be substituted for that of the insolvent.*] C. and M. were partners. They dissolved partnership, M. taking over the assets and liabilities of the firm, and continuing the business. An action was commenced in the District Court in their joint names, the cause of action having arisen before the dissolution of the partnership. M. became insolvent. At the hearing the official assignee of M.'s estate was present in Court, and stated that he was willing to prosecute the action, whereupon the Judge ordered the plaint to be amended by the substitution of his name for that of M. *Held*, on appeal, that the Judge had no power to direct such substitution; that the action was stayed by s. 33 of 5 Vic. No. 17, and could only be continued after election by the official assignee, upon notice to the defendant, and in the name of the insolvent; and that the statement in Court by the official assignee that he was willing to go on, was not an election within the meaning of s. 33. *Lewis v. Mason* (2 N.S.W. L.R. 184) followed. *COHEN v. MOSS* - 156

8.—*Judgment signed in vacation—Irregularity—Waiver—Delay—Insolvency Act* (5 Vic. No. 17), ss. 54 & 56—*Official assignee—Suggestion.*] On January 20th, during vacation, A. issued a writ of summons against B., signed judgment by default, and, on January 29th, issued a writ of *fi. fa.* and levied on certain money then belonging to B., in the hands of a third person. On February 10th, B., who had been arrested by A. on January 20th, under a *ca. re.*, obtained his release by sequestration. On May 27th, B.'s official assignee obtained an order from a Judge in Chambers setting aside the judgment and execution, on the ground that the proceedings, having been taken in vacation, were irregular, and directing the money so recovered to be paid over to the official assignee. *Held* (on appeal from that order), that the signing of the judgment was an irregularity, and not a nullity; but that the official assignee had waived such irregularity by delay. *Held*, also (*DEFFELL, J., dubitante*), that the official assignee was entitled, under s. 54 of 5 Vic. No. 17, to make the application in Chambers, although he had not entered a suggestion under s. 56. *MERCANTILE BANK v. BRODIE* - 443

4.—*Right of reply.*] In cases stated by the Minister under s. 140 of 48 Vic. No. 18, counsel for the Crown has the right to reply. *In re WILSON* - 309

PRINCIPAL AND AGENT—“*Sole agent*” for goods of foreign manufacture—*Privilege of contract—Usage of business—Convenience.*] P., “sole agent” for the sale of the plaintiff's ale, shipped to him by the plaintiff in Scotland, sold a quantity in the ordinary course of business to the defendant, the invoice bearing the words “bought of P.” and in the corner “agents for James Aitken and Co.” P., being indebted to the defendants in an amount exceeding the price of the ale, went insolvent, and the plaintiffs, not having been paid for the ale by P., sued the defendants for the price and obtained a verdict in a District Court. *Held*, that there was no privity of contract between the plaintiffs and the defendants, and that the plaintiffs ought to have been nonsuited. *Held*, also, that according to the usage of business, and the principle of convenience, the relation between P. and the plaintiffs was not that of principal and agents, but of consignor and consignee. Verdict ordered to be entered for the defendants. *AITKEN v. STEWART* - 279

2.—*Husband and wife—Liability of husband on promissory note signed by him as agent for his wife—Husband and wife not joint contractors under the Absent Defendants Act* (4 Vic. No. 6), s. 19.] Declaration by plaintiffs against C. J. and W. G. K. on joint promissory note. Plea by W. G. K., setting out note signed C. J. K. per W. G. K. Replication that C. J. K. was the wife of W. G. K. *Held* (on demurrer), that W. G. K. was not liable on the note [per the C.J.,

and STEPHEN, J.], as the note was made by him "as a mere scribe" for C. J. K., and that there was no contract by W. G. K. *Per tot. cur.* A husband and wife cannot be said to be joint contractors within the meaning of s. 19 of the *Absent Defendants Act* (4 Vic. No. 6). *Quære*, if the section applies to amendments on demurrer. *AUSTRALIAN LOAN Co. v. KIRCHNER* - 296

PRIVY COUNCIL—Appeal—Amount—Action for 500l. penalty. Where a penalty of 500l. was recovered in an action for breaches of the provisions of ss. 28 & 29 of the *Constitution Act* (18 & 19 Vic. c. 54) the Court granted leave to appeal to the Privy Council. *PROUDFOOT v. PROCTOR* (2) - 468

RAILWAYS—Railways Act (22 Vic. No. 19), ss. 108, 133—"Colonial" wine—Wine grown in South Australia—Construction of conditions—Ambiguity—Popular meaning of term. The word "colonial" in the railway regulations must be taken to embrace all the colonies; and therefore "colonial" wine means wine grown in any of the Australian colonies, and not merely wine grown in New South Wales. So *held*, by the Privy Council (affirming the decision of the Supreme Court) for three reasons: First, if the expression "English, colonial, or foreign," in the conditions indorsed upon the contracts for the carriage of goods by the Government railways, is to be taken as an exhaustive distribution, the word "colonial" must embrace all the colonies. Secondly—If a charge is imposed by the Government, they should impose it in clear language, and any ambiguity must be construed in favour of the person charged. Thirdly, the practice of carrying South Australian wines at the lower rate, having been in force for some years, must be taken as a sort of contemporaneous exposition of the ambiguity. *Semble*, that evidence of a popular meaning, or a meaning generally accepted by men of business, of the term "colonial wine" would have been conclusive. *HYLAND v. COMMISSIONER FOR RAILWAYS* (Priv. C.) - 212

REAL PROPERTY ACTS—41 Vic. No. 18, s. 4—Caveat—Directing issues—Discretion of Court—Former actions of ejectment. In 1869, John and George Lethbridge applied to bring certain lands under the *Real Property Act*, alleging a title by possession of more than 25 years. Before this, one S. had applied to bring the same land under the Act, setting up a documentary title, which was rejected by the examiners of titles. In 1876, S. conveyed the land to M. (the present caveator), who brought ejectment. The defendants (the present applicants) in that action admitted M.'s *prima facie* documentary title, but proved in themselves, as against such documentary title, a possessory title to the satisfaction of the jury, and obtained a verdict. A rule to set aside that verdict having been refused, M., in 1878, began a fresh action of ejectment, which he discontinued in the following year, whereupon the applicants

signed judgment. They subsequently renewed their application for a certificate of title, and their title having been passed, and the application advertised, M., on March 25th, 1887, lodged his caveat, and on May 26th filed his case, asking to have an issue directed to determine whether the applicants were entitled to the land by possession as claimed by them. *Held* (on motion for an order for the withdrawal of the caveat), that the caveat must be withdrawn, on the ground that the caveator would, under the circumstances, be restrained in Equity from trying the issue if directed. *Re LETHBRIDGE v. MITCHELL* - 249

2.—41 Vic. No. 18, s. 4—Issue—Verdict given—Application to remove caveat—Costs. After verdict in an issue under the *Real Property Act* in favour of the applicant, he should first ask the caveator to remove his caveat. [*Semble*, per FAUCETT, J., and INNES J. If the caveat is not removed he should apply *ex parte* for an order removing it. *Quære* (per the C.J.) if any order necessary.] A direction as to extra costs cannot be obtained before taxation. *KINSELA v. METROPOLITAN MUTUAL PROV. BUILDING Co., &c.* - 277

3.—26 Vic. No. 9, ss. 33, 40, 115, subs. 5—Certificate of title—Error in survey—Misdescription of boundaries—Encroachment on adjoining land—Certificate not conclusive evidence. J. M. applied for and obtained a certificate of title to certain lands described in the application and the certificate, all formalities required by the *Real Property Act* having been duly complied with. Some years after it was discovered that a portion of defendants' land was, owing to a mistake made in the survey, included in the certificate issued to J. M. The defendants claimed the land under Crown grant and various deeds of a date prior to the issue of the certificate to J. M. The plaintiffs, devisees of J. M., set up that under the *Real Property Act* (26 Vic. No. 9), s. 33, the certificate issued to J. M. was conclusive evidence of his ownership. *Held*, that s. 40 of the *Real Property Act* must be read as a proviso of s. 33. *Held*, also, that the present case came under s. 115, sub-sec. 5, of the *Real Property Act*, and that plaintiffs were therefore not entitled to succeed. *MARSDEN v. M'ALISTER* 300

REGISTRATION—See DEED—SHERIFF.

SHERIFF—Sale by—Fi. fa.—Right, title, and interest—Registration. B. obtained a judgment against W. G. and issued a *fi. fa.*, which was afterwards withdrawn. Subsequently to the issuing of that writ, W. G. transferred a selection to G. (the defendant). This transfer was not registered. Afterwards B. issued a second writ of *fi. fa.* against W. G., under which the sheriff sold to B. all W. G.'s right, title, and interest (if any) in this selection. This transfer was registered. B. brought ejectment against G. (the defendant). *Held*,

that the first writ, having been withdrawn, did not bind the land so as to invalidate the transfer by W. G. to the defendant; and that as W. G. had sold the land before the second writ was issued, there was no right, title, or interest left in him for the sheriff to convey, and therefore no transfer to register [*Re Elliott* (7 N.S.W. L.R. 271) followed]. If anything had passed at the sheriff's sale, the registration of that transfer would have given it priority over this unregistered transfer to the defendant. *BLAXLAND v. GRATTAN* - 287

SMALL DEBTS ACT—*See* INTERPLEADER.

STATUTES—

- 4 *Vic. No. 6, s. 19.*—*See* PRINCIPAL & AGENT.
- 5 *Vic. No. 9, ss. 33, 35.*—*See* PLEADING.
- 5 *Vic. No. 17, ss. 34, 55.*—*See* INSOLVENCY.
- ss. 54, 56.*—*See* PRACTICE.
- 10 *Vic. No. 10, s. 32.*—*See* INTERPLEADER.
- 11 *Vic. (Union Bank Act).*—*See* BILL OF LADING.
- 11 *Vic. No. 20, s. 39.*—*See* CRIMINAL LAW, 8.
- 11 *Vic. No. 33, ss. 13, 14.*—*See* ATTORNEY, &c., 5, 6.
- 14 *Vic. No. 9, s. 1.*—*See* JUSTICES.
- 17 *Vic. No. 21, s. 165.*—*See* LANDLORD AND TENANT.
- 18 & 19 *Vic. No. 54, ss. 28, 29.*—*See* PENALTY.
- 20 *Vic. No. 31, ss. 27, 29, & 31.*—*See* GOVERNMENT.
- 22 *Vic. No. 18, s. 94.*—*See* DISTRICT COURT, 3.
- s. 101.*—*See* COSTS, 2.
- 22 *Vic. No. 19, ss. 108, 133.*—*See* RAILWAYS.
- 26 *Vic. No. 9, ss. 33, 40, 115 (subs. 5).*—*See* REAL PROPERTY.
- 31 *Vic. No. 12, ss. 42, 99, 163.*—*See* MUNICIPALITIES, 3, 4.
- s. 128.*—*See* NEGLIGENCE.
- 36 *Vic. No. 14, ss. 15, 16.*—*See* BY-LAW.
- 37 *Vic. No. 15, s. 3.*—*See* MUNICIPALITIES, 3.

- 38 *Vic. No. 1.*—*See* CRIMINAL LAW, 6.
- 39 *Vic. No. 38.*—*See* GOVERNMENT.
- 41 *Vic. No. 18, s. 4.*—*See* REAL PROPERTY.
- 42 *Vic. No. 19, ss. 44, 49.*—*See* BILL OF LADING.
- 43 *Vic. No. 3, ss. 8, 50, 142.*—*See* MUNICIPALITIES, 2, 14.
- 44 *Vic. No. 30, s. 1.*—*See* DISTRICT COURT, 2, 4.
- 44 & 45 *Vic. c. 69*
- 41 *Vic. No. 44 (New Zealand)* } *See* FUGITIVE
- 47 *Vic. No. 26 (New Zealand)* } OFFENDERS.
- 45 *Vic. No. 14, s. 25.*—*See* LICENSING ACTS.
- 46 *Vic. No. 17.*—*See* CRIMINAL LAW—NEW TRIAL.
- 46 *Vic. No. 24, s. 8.*—*See* LICENSING ACTS.
- 48 *Vic. No. 18.*—*See* CROWN LANDS.

SYDNEY CORPORATION ACT—*See* MUNICIPALITIES.

TRESPASS—Judgment set aside for irregularity committed by District Court bailiff—Justification under warrant of execution—Liability of party.] A judgment was summarily signed in the District Court on a summons under s. 1 of 48 Vic. No. 7, and execution issued. The judgment was set aside by the District Court Judge on the ground that a bailiff of the Court, whose duty it was to serve such summons, had made a false affidavit of personal service. Held, that an action of trespass would not lie, as the party was not liable for the improper act of the bailiff, committed while discharging his duty as a public officer. *FOX v. ASHWIN* - - - 384

UNION BANK ACT—(11 Vic.)—*See* BILL OF LADING.

WARRANT—*See* JUSTICES.

APPENDIX.

CROWN LANDS—*Crown Lands Act* (48 Vic. No. 18), s. 21—*Lands comprised within leasehold areas—Forfeited conditional purchases open to re-selection.*] Conditional purchases, being locally within the ambit of the leasehold area, but not being part of the area

actually leased, revert, on forfeiture, to the Crown, and are not exempt from conditional sale, as being "lands comprised within leasehold areas" under s. 21 subs. III. The decision of the Supreme Court (7 N.S.W. L.R. 374) reversed. *EDOLS v. TEARLE* - - 518

CASES IN EQUITY.

ACCOUNT—*See* TRUSTEE AND CESTUI QUE TRUST.

ATTORNEYS' ACT—*See* PRACTICE.

AUTHORITY OF ATTORNEY—*See* PRACTICE, 2.

COSTS—*Discretion of Court of Equity not unlimited—Decree varied.*] The Court of Equity has not unlimited discretion as to costs. *E.g.*: It cannot deprive a plaintiff, who succeeds in every particular of the claim, of costs, if the defendant has opposed the claim of the plaintiff throughout, unless the

plaintiff has been guilty of some grave misconduct. Delay in instituting proceedings when such delay has caused no injury to the defendant, is not sufficient ground to enable the Court to deprive a successful plaintiff of costs. *EMERLIN v. EMERLIN* - - - 1

2.—See PRACTICE, 1.

3.—See PRACTICE, 2.

CROWN GRANT—Dowry—Words of limitation—Dowry grant—“Heirs of such children lawfully issuing”—Estate in fee simple.] Grant to trustees on trust, &c. Remainder to R. J. and F., his wife. In case there shall be but one child of the said marriage, to the use of such only child, his heirs and assigns for ever; and in case there shall be more than one child, then to the use of all and every the children of the said marriage equally, to be divided between them, share and share alike as tenants in common, and of the heirs of such children lawfully issuing. And for default of such issue of the said marriage, or being such if all shall die in the lifetime of the said R. J. and F., his wife, or of the survivor of them, &c., &c. *Held*, reversing the decision of *Manning, P.J.*, that the original children took as tenants in common in fee simple. *JOHNSTON v. DICKENSON* - - - 50

CY-PRES.—See RESUMPTION.

DECLARATION OF TRUSTS—See WILL, 3.

DIRECTION TO INVEST—See WILL, 1.

DOWRY GRANT—See CROWN GRANT.

ESTATE-TAIL—To what extent barred by tenant-in-tail—See MORTGAGE.

EXECUTORS—Estate of—See WILL, 1.

FRAUD—Knowledge of in principal—See NOTICE.

GIFT—See WILL, 3.

GUARDIAN AND WARD—Testamentary guardian—Marriage of infant female ward—Guardianship not determined.] By his will, testator appointed his wife as guardian of his infant children during her widowhood, and devised to his daughter C., for her separate use, certain lands, giving the trustees of his said will discretion to apply the whole or any part, of the income arising from the shares devised to the children, to their maintenance respectively during infancy. C., while still an infant, married, her husband being also an infant. *Held*, that C.'s marriage did not determine the guardianship of her mother, and that her mother could consequently give the trustees a

good receipt for any moneys paid by them for the support of C. *Re HORDMAN'S WILL* - 15

INFANT—Marriage of female ward—See GUARDIAN and WARD.

LACHES—See WILL, 3.

2.—See NOTICE.

MENTAL CAPACITY—See WILL, 2.

MORTGAGE DEED—See TRUSTEE AND CESTUI QUE TRUST.

MORTGAGOR AND MORTGAGEE—Common law remedies of mortgages—Compulsory sequestration of mortgagor's estate on unsatisfied judgment—Injunction—5 Vic. No. 17, s. 39.] A Court of Equity has no power to restrain a mortgagee from exercising all his remedies at law and at equity at the same time. The sale of mortgaged property under the mortgagee's power of sale having been frustrated by the misconduct of the mortgagor, the mortgagee sued on the covenant for payment, obtained judgment for the whole amount of the mortgage debt and interest, and issued execution. The mortgagor failed to point out to the bailiff charged with the execution of the writ of *fi. fa.* any disposable property except the equity of redemption, for which, on its being put up for sale by the sheriff, no bid was made. The mortgagee thereupon filed a petition in insolvency, and obtained an order *in* for the sequestration of the mortgagor's estate, on the ground that the mortgagor had not pointed out sufficient disposable property to satisfy the said judgment debt. The mortgagor then commenced a suit in equity to restrain the mortgagee from further prosecuting the said petition in insolvency. *Held*, that the mortgagor had disclosed no equity to justify the issuing of the injunction; and that, as there had been no misconduct or fraud on the part of the mortgagee, the Court of Equity could not interfere to restrain the exercise of his legal remedies. *Held*, also, that, under 5 Vic. No. 17, s. 39, a mortgagee, as a secured creditor can present a petition in insolvency with respect to the whole amount of his debt and interest. *SACHS v. BEAUMONT* - - 5

MORTGAGE—Tenant for life—Mortgage—Tenant-in-tail in remainder, joining to bar estate tail—Estate tail barred for special purpose of mortgage.] T. U. being seised of certain lands for an estate for life, with remainder to his children as tenants-in-common in tail general, mortgaged his life estate to one R. to secure an advance of 800*l.*, all his children being at the time infants. Subsequently, one of his children, M., the wife of R. McD., having attained her majority, R. advanced an additional 500*l.* on a mortgage of other property

settled in the same manner. In this second mortgage B. McD. and his wife joined, barring the estate-tail in remainder vested in M. The mortgage followed in terms s. 16 of the *Registration Act*, and purported to operate as a conveyance by B. McD. and M. (his wife), of the lands and premises in which M. had an estate-tail, in fee simple to E., barred of all estates, &c., that were to take effect after the determination or in defeasance of such her estate-tail. *Held*, that though the express terms of the mortgage were sufficient to bar the estate-tail of M. for all purposes, yet the intention of the parties being merely to give E. a better and larger security, the estate-tail of M. was barred only for the special purpose of the mortgage. *In re UNDERWOOD ESTATE ACTS & FELTON'S PETITION* - - - 122

NOTICE—*Imputed—Fraud in principal—Solicitor—Knowledge of principal's fraud—Distinction between right to sue and equitable estate—Acquiescence—Innocent purchasers for value.*] W. purchased certain lands from plaintiffs under circumstances which amounted to fraud on his part, and C. acted as his solicitor in the transaction. W. afterwards sold the land in question to defendants, who had no knowledge or actual notice of W.'s fraud, but C. acted as their solicitor. The plaintiffs sought to impute to the defendants, through C., notice of their right to sue to have the conveyance to W. set aside, on the ground of fraud. *Held*, that the plaintiffs must fail, since C. either knew of W.'s fraud or of some circumstances suspicious enough to make him unwilling to divulge them to a subsequent client, in either of which cases the rule laid down in *Kennedy v. Green* would apply; or else he knew no more than that the plaintiffs had a right to sue to have the conveyance from them to W. set aside, in which case the doctrine of imputed notice did not apply. *Held*, also, that, as against the defendants, the plaintiffs had lost their right of suit by acquiescence. The Court will not extend the doctrine of imputed notice. Decree of *Manning, P.J.*, upheld. *GREEN v. FLETCHER* - - - 58

2. — See TRUSTEE AND CESTUI QUE TRUST.

PRACTICE—*Bill of costs—Taxation by Master in Equity—Special agreement—11 Vic. No. 83, s. 2.*] On the taxation of a bill of costs the Master has jurisdiction to determine whether or not an agreement as to the scale on which costs were to be charged was made between the parties, and to tax the bill on the basis of such agreement. The Court will not disturb the finding of the Master on a question of fact, unless satisfied that he was clearly wrong. *Re M'CULLOCH'S COSTS* - - - 47

2. — *Solicitor and client—Authority to institute proceedings in client's name—Challenge to produce authority—Answer to suit—Costs.*] Defendants having a claim on plaintiff

company issued a writ to recover the amount, and the writ being returned *non est incensus*, took proceedings by way of foreign attachment under the *Abolition Defendants Act*. W., who had acted as solicitor for the plaintiff company on previous occasions, refused to accept service of the writ originally issued by defendants, but on defendants taking the further proceedings, filed a claim in the name of the plaintiff company, and obtained an injunction *ex parte*, restraining defendants from proceeding with their action at law. On the motion to continue the injunction, defendants took the objection that W. had no authority to institute the suit, but *Manning, P.J.*, overruled the objection, and continued the injunction till the hearing. *Held*, on appeal, that the defendants had a right to call on W. to produce his authority, and that as he had failed to do so the injunction must be dissolved and the suit dismissed with costs as between solicitor and client, to be paid by W. *HAWKINS HILL GOLD MINING CO. v. BRISCON AND OTHERS* - - - 123

POWER OF SALE—*See TRUSTEE AND CESTUI QUE TRUST.*

REGISTRATION ACT—*See WILL, 3.*

2. — See MORTGAGE.

RESUMPTION—*Payment of compensation money into Court—Particular object of trust fulfilled—Payment out—Cy près.* A grant of certain land having been made for the purpose of building a church thereon, the church was built on part of the land. Another part of the land which would have been suitable for a parsonage was resumed by the Commissioner for Railways, who paid the compensation money into Court. The trustees applied for the money to be paid out, to enable them to pay for certain land which they had agreed to purchase as a site for a parsonage in connection with the church, and to erect a parsonage thereon. The church at the time of the application was complete and in good repair. *Held*, that as it was impossible to apply the money in strict conformity with the terms of the trust, the Court had power to order the money to be expended on an object connected with the object of the trust. *Re TRUSTEES OF ST. BARNABAS' CHURCH* - - - 22

SOLICITOR AND CLIENT—*Notice of fraud when imputed to subsequent client—See NOTICE.*

2.—See PRACTICE, 2.

TITLES TO LAND ACT—*See WILL, 3.*

TRUST—*See RESUMPTION.*

TRUSTEE AND CESTUI QUE TRUST—*Trust deed—Sale under power—Excessive demand—Proviso for protection of purchasers—Notice—Breach of trust—Avoidance of sale—*

Account when taken.] To secure advances, plaintiffs assigned to defendant B. all their interest in a coal mine on trust to carry on the same, and in certain events to sell. B. made a demand on the plaintiffs for an amount largely in excess of what was due to him under the deed, and in default of payment sold the property to the other defendants, S. & S. *Held*, that B. did not stand in the same position as a mortgagee, but that he was a trustee, and that consequently he was not justified in selling the property on the plaintiffs failing to tender the amount due to him. *Held*, also, that a clause in the deed of trust providing for the protection of purchasers from B., by exonerating them from inquiry, did not operate to protect them in the event of their having express notice of the breach of trust committed by B., and *Held*, also (STEPHEN, J., *dissentiente*), that the defendants, other than B., had such notice. *HARPER v. BROWN* - 86

UNDUE INFLUENCE—*See WILL*, 2.

WILL—(1)—*Estate of executors—Implied power of sale—Direction to invest.*] Testator by his will gave his estate, including freehold, conditionally purchased, and leasehold lands, sheep, farm implements, and money to his widow and children in thirteen aliquot shares, and directed some of such shares to be invested in Government debentures or bank securities, for his daughters' sole use on their attaining the age of twenty-five years. *Held*, that, notwithstanding a direction in the will that two specific properties were not to be sold, the executor had implied power to sell the said properties when the period of distribution arrived, and that the direction applied only to an immediate sale. *MUNRO v. COOK* - 17

2. — *Will—Mental incapacity—Undue influence—Circumstantial evidence.*] The Court can infer undue influence from the circumstances of the case, and need not have direct proof. *Callaghan v. Myers* followed. *WATSON v. KERIDGE* - 25

3. — *Gift—Deed or will—Declaration of trust—Execution and attestation—Retention of possession—Unnatural gift—Registration Act (7 Vic. No. 16)—Promise of grant—Titles to Land Act (22 Vic. No. 1)—Laches.*] Under a document, purporting to have been executed in 1825, the plaintiffs claimed certain lands in the city of Sydney. The document, which was unregistered, was as follows:—

Sydney,

28th of December, 1825.

This is to certify that I, Henry Linden, of the city of Sydney and colony of New South Wales, have given and granted, and by my own free will have freely given and granted, to my beloved child, Annie Clarke, the daughter of Matthew Clarke, all and singular my goods and chattels, consisting of household furniture, horse, cart, and harness, and all the lands I now possess in the city of Sydney and the colony of New South Wales, providing the said Annie Clarke survives I (*vic*), Henry Linden, and my beloved wife, Ann Linden. I freely give the above-mentioned goods, chattels, and lands to her absolutely as hers for ever, without any other manner of condition.

In witness whereof I hereunto put my mark and seal this twenty-eighth day of December, one thousand eight hundred and twenty-five.

his
(Signed) Henry x Linden (L.S.)
mark.

Signed, sealed and given over to Matthew Clarke in the presence of us witnesses.

(Signed) John Stubbs.

her
(Signed) Jane x Clarke.
mark.

Held, that the document must be construed as a testamentary document.

Held also, that under the circumstances of the case a registered conveyance for value by a devisee, of lands devised to him by the testator, is entitled to priority as against an unregistered conveyance of the same lands by the testator himself.

Held also, that at the time of executing the document H. L. had not under all the circumstances of the case any transmissible interest in the lands in question.

Held also, that as the document did not pass any estate or interest at law in the lands, the Court would not decree a conveyance of the legal estate thereunder to a volunteer.

The Court looks with suspicion on a document, produced after the death of the person making it, and of both witnesses, which purports to make an unnatural gift of property, where it is executed by a marksman, one of the attesting witnesses being also a marksman, and the document being in the handwriting of the other attesting witness, even where such a document, by statute, proves itself. *REID v. KEARNEY* - 37

WORDS OF LIMITATION—*See CROWN GRANT.*

CASES IN DIVORCE.

ALIMONY—*See PRACTICE*, 1.**APPEAL PENDING**—*See PRACTICE*, 2.**COSTS**—*See PRACTICE*, 1.**DAMAGES**—*See PRACTICE*, 3.**DECREE ABSOLUTE**—*See PRACTICE*, 4.**JURY**—*See PRACTICE*, 3.**NULLITY OF MARRIAGE**—*See PRACTICE*, 4.

PRACTICE (1)—*Stay of proceedings—Costs of previous suit—Alimony—Parties.*] Where the respondent in a former suit has neglected to pay costs and alimony as ordered by the Court, the Court will not stay proceedings in a suit in which he is petitioner, on the ground that such costs and alimony have not been paid. *Yetman v. Yetman* (21 L.J. P. & M. 647) followed. *DORN v. DORN AND NICHOLSON* (1) - - 1

2.—*Appearance under protest—Appeal on point of law pending—Pleadings not complete—Issues settled and mode of trial fixed.*] The Court will settle issues and fix the mode

of trial, even where an appeal is pending against an order made in the suit, which appeal, if successful, would render the trial unnecessary, and though the pleadings in the suit are, at the time of making the application, not complete. *DORN v. DORN AND NICHOLSON* (2) - - - - - 2

3.—*No answer filed by co-respondent—Right to strike jurors—Effect on non-appearance on question of damages.*] Where a co-respondent has not entered an appearance, or filed an answer, he is still entitled to strike jurors. The jury is bound to find some damages against a co-respondent who has not filed an answer to the petition, even though they find that the respondent has not committed adultery. *MCGARRY v. MCGARRY AND PIKE* - - - 3

4.—*Nullity of marriage—Unsound mind—Decree absolute*—48 Vic. No. 3, s. 9.] In certain cases the Court will fix some time less than six months within which to make absolute the decree *nisi*. *EVANS v. BRENTON, f. c. TREDENNICK* - - - - - 4

PARTIES—*See PRACTICE*, 1.**SETTLING ISSUES**—*See PRACTICE*, 2.**STAY OF PROCEEDINGS**—*See PRACTICE*, 1.

CASES IN LUNACY.

INSANE PATIENT—*Incurable—Pauper—Alleged agreement to sell lands—Conveyance in pursuance by next of kin—Directions to Master in Lunacy—Lunacy Act, 1878 (42 Vic. No. 9).*] It was alleged by one J. R., that on the 9th of May, 1859, J. O'D. being seised of certain land agreed to convey the same to him for value. On the 21st of May, 1859, J. O'D. was admitted as a pauper patient into a Government hospital for the insane, and in 1865 was removed to another hospital, as incurable. By deed of 29th of July, 1861, T. O'D., heir-at-law to J. O'D., conveyed the said land to J. R., in pursuance of the

alleged agreement, and, as indemnity, gave J. R. a bond for 300*l*. On the 27th of July, 1886, J. R. applied to bring the land under the provisions of the *Real Property Act*, and the Master in Lunacy, on being acquainted with the facts, applied to the Court for advice and directions. *Held*, that the Master should take the necessary steps to make the property available for the patient's support. *Re JOHN O'DONNELL* - 1

LUNACY ACT—*See INSANE PATIENT*.

CASES IN VICE-ADMIRALTY.

COSTS—*Taxation—Marshal's fees and disbursements—Executing decree of sale—Preparing conditions of sale—Possession money when ship arrested in another suit.*] The Marshal is not entitled to a fee for executing the decree of sale in addition to a fee for executing a decree of

appraisement. When the circumstances are such that a prudent vendor would naturally protect his interests by carefully prepared conditions of sale, the Marshal may be allowed the costs (to be settled by the Registrar) of such preparation. Where a ship, already

under arrest, and in the possession of the Marshal, is arrested in a second suit, no fees for possession in respect of the second suit can be allowed. *THE TYBURNIA* (No. 2) - - 8

NECESSARIES—26 *Vic. cap. 24, s. 10*—*Premium on policy of insurance*] The insurantee of a ship is not a necessary within the meaning of 26 *Vic. cap. 24, s. 10*. *The Heinrich Bjorn* (L.R. 8 P.D. 151) followed. *STOKES AND OTHERS v. THE CONFERENCE* - - - - 10

WAGES AND DISBURSEMENTS—*Priorities of different claimants—Detention money in respect of wages after commencement of action.*] When a fund, by the sale of a ship, is placed in Court by one set of claimants so as to be available for other claimants, the former are entitled to their costs up to and including sale, though they do not rank first in respect of their actual claim. Seamen's claims for wages have priority over master's wages and disbursements. A master is entitled to detention money in respect of wages since the commencement of the action up to taxation of costs. *THE TYBURNIA* (No. 1) - - - - 1



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